

No. 15797

United States
Court of Appeals
for the Ninth Circuit

MARC D. LEH and L. WAIVE LEH,
Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DAVID E. BROWN and CHRISTOBEL H.
BROWN, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court
of the United States

JAN 16 1958

PAUL F. O'NEAL, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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The Tax Court of the United States

Docket No. 53878

MARC D. LEH and L. WAIVE LEH, Husband
and Wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1954

July 16—Petition received and filed, taxpayer notified, fee paid.

* * * * *

1956

April 9 & 10—Respondent's oral motion to consolidate Docket No. 53897, for trial—Granted.

* * * * *

1957

Jun. 20—Decision entered, Judge Raum, Div. 11.
Served 6/21/57.

Sep. 16—Petition for Review by U. S. Court of Appeals, 9th Circuit filed by petitioner.

Sep. 17—Proof of Service filed.

Sep. 30—Designation of contents of record on appeal with proof of service thereon, filed.

* * * * *

The Tax Court of the United States

Docket No. 53879

DAVID E. BROWN and CHRISTABEL H.
BROWN, Husband and Wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1954

July 16—Petition received and filed. Taxpayer notified. Fee paid.

* * * * *

1957

Jun. 20—Decision entered, Judge Raum, Div. 11.
Served 6/21/57.

Sep. 16—Petition for review by U. S. Court of Appeals, 9th Circuit filed by petitioner.

Sep. 17—Proof of Service filed.

Oct. 9—Designation of contents of record on appeal with proof of service thereon, filed.

[Title of Tax Court and Docket No. 53878.]

AMENDED PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Ap:LA:AA-CTF 90D:GCE) dated

April 23, 1954, and as a basis of their proceeding, allege as follows:

1. Petitioners are individuals with principal office at 620 West Anaheim Street, Long Beach, California. The return for the period herein involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached to the original petition herein and marked Exhibit A) was mailed to petitioners on April 23, 1954.

3. The deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) Respondent erroneously determined that the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company, a partnership in which petitioner Marc D. Leh held a 50 per cent interest, constituted ordinary income rather than capital gain as reported on petitioners' return.

(b) Respondent erroneously failed to allow a net operating loss deduction based upon a net operating loss carryback from the year 1951 in the amount of \$8,571.44.

5. The facts upon which petitioners rely are as follows:

(a) Petitioners are and at all times material hereto were husband and wife.

(b) At all times pertinent hereto the Progress Company was a partnership composed of petitioner Marc D. Leh and David E. Brown. Petitioner Marc D. Leh was entitled to 50 per cent of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months was 50 per cent.

(c) On or about July 26, 1950, the Progress Company sold property constituting a capital asset. Said property had been held continuously by the Progress Company for more than six months, to wit, since January 28, 1948.

(d) Said property consisted of a written contract relating to the purchase of certain quantities of gasoline at specified prices, together with those rights created or transferred thereby.

(e) The terms of said contract were embodied in two letter agreements executed January 28, 1948; copies of said letter agreements are attached hereto marked Exhibit C and Exhibit D, and are made a part hereof by reference.

(f) The gain realized by the Progress Company from such sale was \$183,330.50.

(g) Petitioners sustained a net operating loss attributable to the operation of trades and businesses regularly carried on by petitioners in the amount of \$8,571.44 during the year 1951. Said loss was a net operating loss carryback for the preced-

ing year, 1950, and constituted a net operating loss deduction for 1950 in that amount. Petitioners filed with respondent on March 15, 1954, a claim of refund on Form 843 for the calendar year 1950. Said claim of refund is attached to the original petition herein, marked Exhibit B. The facts stated in said claim for refund are incorporated herein by reference as if set forth herein in full.

Wherefore, petitioners pray that this Court hear the proceeding and determine, (a) that respondent's determination of the tax is erroneous insofar as the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company is treated by respondent as ordinary income; (b) that no deficiency exists in petitioners' income tax liability for the taxable year ending December 31, 1950; (c) that petitioners' claim of refund should be allowed, that petitioners are entitled to an additional deduction of \$8,571.44 in calendar year 1950, and that petitioners are entitled to a refund of \$2,475.62 (or such greater amount as may be legally refundable) with interest; (d) for such other and further relief as the Court deems just.

Dated: February 27, 1956.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

EXHIBIT "C"

OLYMPIC REFINING COMPANY

2425 California Avenue

Long Beach, Cal.

January 28, 1948

The Progress Co.,
530 West 6 Street,
Los Angeles, California.

Gentlemen:

We are pleased to submit below our proposal to serve you with your requirements of our gasoline.

Your signature of acceptance acknowledges that you have read and are familiar with the terms and conditions of that certain agreement between Olympic Refining Company and the General Petroleum Corporation of California, dated November 19, 1945, and that the terms, amendments, conditions and provisions are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full, except that:

1. The quantity of gasoline will be two and one-quarter million gallons, 10% more or less, subject to our option;
2. The prices you will pay us will be one-half cent per gallon greater than the prices which are set forth in said agreement; and,
3. Gasolines purchased hereunder will not be resold for delivery into the States of Washington and Oregon nor within the territory in the State of

California which is embraced within exclusive distributor contracts with the Olympic Refining Company as follows: San Francisco, San Jose, Glendale, Pasadena, and San Diego.

Very truly yours,

OLYMPIC REFINING COMPANY,

/s/ By H. J. STEITZ,

H. J. Steitz,

Vice-President.

Acceptance:

THE PROGRESS CO.,

/s/ By MARC D. LEH,

Marc D. Leh.

EXHIBIT "D"

THE PROGRESS COMPANY

530 West Sixth Street

Los Angeles, California

January 28, 1948

Olympic Refining Company,
2425 California Avenue,
Long Beach, California.

Gentlemen:

In consideration of the gasoline contract which we have entered into with your company as of this date, it is understood that, in the event the Olympic Refining Company extends and/or makes a contract for gasolines with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. shall have an

extension of its agreement on the same terms and conditions, with the exceptions noted in our agreement of this date.

Likewise, if The Progress Co. should negotiate a contract for gasolines similar to the above referred to type of contract with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. will pay to the Olympic Refining Company one-half ($\frac{1}{2}$ c) cent per gallon during the life of said contract.

Very truly yours,

THE PROGRESS CO.,

/s/ By MARC D. LEH,

Marc D. Leh.

MDL:o

Acceptance:

OLYMPIC REFINING COMPANY,

/s/ By H. J. STEITZ,

H. J. Steitz,

Vice-President.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

AMENDMENT TO AMENDED PETITION

Come now, the petitioners and amend their Amended Petition herein as follows:

By striking out the words "constituting a capital asset" in paragraph 5(c) thereof, and substituting therefor the words "used in its trade or business."

Dated: April 4, 1956.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amended petition filed by the above-named petitioners, admits and denies as follows:

1. Admits that the petitioners are individuals and that the return for the period herein involved was filed with the Collector for the Sixth District of California; denies the remainder of the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86; denies the remainder of the allegations contained in paragraph 3 of the amended petition.

4(a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the amended petition.

5 (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the amended petition.

(c) and (d). Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the amended petition.

(e). Denies that the terms of said contract were embodied in two letter agreements executed January 28, 1948; admits the remaining allegations contained in subparagraph (e) of paragraph 5 of the amended petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the amended petition.

(g). Admits the allegations contained in subparagraph (g) of paragraph 5 of the amended petition, except that the respondent denies that the facts stated in said claim for refund are incorporated herein by reference as if set forth herein in full.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ JOHN POTTS BARNES, REM,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; G. E. Constable, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

ANSWER TO AMENDMENT TO AMENDED
PETITION

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amendment to the amended petition filed by the above-named petitioners, denies all of the allegations therein.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ JOHN POTTS BARNES, ECC,
Chief Counsel, Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel;
E. C. Crouter, Assistant Regional Counsel;
R. E. Maiden, Jr., Special Assistant to the Regional Counsel; G. E. Constable, Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53878.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the parties hereto, by their respective counsel, that the facts hereinafter stated shall be taken as true, provided, however, that upon the trial of this case either party hereto shall have the right to (a) introduce other and further evidence not inconsistent with the facts herein stipulated; and (b) object to the materiality and relevancy of any fact herein stipulated.

1. Petitioners are and at all times material hereto were husband and wife.

2. At all times pertinent hereto The Progress Company was a partnership composed of petitioner Marc D. Leh and David E. Brown. Petitioner Marc D. Leh was entitled to 50% of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchange of capital assets held for more than six months was 50 per cent.

3. The deficiency whose redetermination is petitioned for herein was determined by the Commissioner in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute. Said deficiency arises out of petitioners' distributive share of said partnership's net income and/or capital gain for the calendar year 1950.

4. The item of "travel and entertainment expenses disallowed" in the amount of \$4,263.48, as

set forth on page 2 of said notice of deficiency, is not disputed by petitioners.

5. The item of capital loss carry-over from 1949, disallowed in the amount of \$2,334.58, as set forth on page 3 of said notice of deficiency, is not disputed by petitioners.

6. Petitioners filed with respondent on March 15, 1954, a claim of refund on Form 843 for the calendar year 1950. A true copy of said claim of refund is attached to the original petition herein, marked Exhibit B. The claim for refund asserts a 1951 net operating loss carry-back to the year 1950 in the amount of \$8,571.44. Respondent concedes that the carry-back is proper.

7. At all times pertinent hereto, General Petroleum Corporation was a Delaware corporation, wholly owned by Socony-Mobil Oil Company, Inc.

8. At all times pertinent hereto, Olympic Refining Company was a Washington corporation, none of whose stock was owned by petitioners or by David E. Brown.

9. At all times pertinent hereto, Olympic-Progress Oil Co. was a California corporation, a majority of whose stock was owned by petitioners and David E. Brown.

10. Joint Exhibit 1-A attached hereto is a true copy of a contract entered into on November 19, 1945, between General Petroleum Corporation and Olympic Refining Company.

11. Joint Exhibit 2-B attached hereto entitled "Distributors' Agreement" is a true copy of a contract entered into between Olympic Refining Com-

pany and The Progress Company on October 20, 1947.

12. Joint Exhibit 3-C attached hereto is a true copy of a letter agreement between Olympic Refining Company and The Progress Company.

13. Joint Exhibit 4-D attached hereto is a true copy of a contract entered into on January 28, 1948, between The Progress Company and Olympic Refining Company. The same is attached as Exhibit C to the amended petition herein.

14. Joint Exhibit 5-E attached hereto is a true copy of a contract entered into on January 28, 1948, between The Progress Company and Olympic Refining Company. The same is attached as Exhibit D to the amended petition herein.

15. Joint Exhibit 6-F attached hereto is a true copy of a letter from The Progress Company to Olympic Refining Company.

16. Joint Exhibit 7-G attached hereto is a true copy of a letter agreement between Olympic Refining Company and The Progress Company.

17. Joint Exhibit 8-H attached hereto entitled "Mutual Termination Agreement" is a true copy of a contract entered into on July 26, 1950, between The Progress Company, Olympic-Progress Oil Co., and Olympic Refining Company.

18. Joint Exhibit 9-I attached hereto is a true copy of a contract entered into between Olympic Refining Company and General Petroleum Corporation on July 31, 1950.

19. Joint Exhibit 10-J attached hereto is a true copy of a contract entered into between Olympic

Refining Company and General Petroleum Corporation on August 1, 1950.

20. Prior to July 26, 1950, that certain contract between The Progres Company and Olympic Refining Company attached hereto as Joint Exhibit 2-B, as amended, was assigned by The Progress Company to Olympic-Progress Oil Company, a corporation.

21. On July 26, 1950, Olympic Refining cancelled an indebtedness of The Progress Company owed to Olympic Refining Company in the amount of \$183,330.50, pursuant to the terms of the Mutual Termination Agreement attached hereto as Joint Exhibit 8-H.

22. That certain contract captioned "Mutual Termination Agreement," Joint Exhibit 8-H herein, was written by one Robert E. Paradise, Esq., as an attorney at law, for Olympic Refining Company.

23. At all times pertinent hereto said Olympic Refining Company has been and now is the client of said Robert E. Paradise, Esq.

24. At the present time said Olympic Refining Company is engaged in litigation as plaintiff and cross-defendant, in opposition to petitioners herein and others as defendants and cross-complainants.

25. Robert E. Paradise, Esq., represents Olympic Refining Company as its attorney in said litigation against petitioners herein.

26. Robert E. Paradise, Esq., has expressed to the attorneys for both petitioners and respondent herein his reluctance to appear as a witness at the

trial hereof because of the facts set out in paragraphs 22, 23, 24 and 25 herein.

27. Joint Exhibit 11-K attached hereto is a true copy of the 1950 income tax return of The Progress Company.

28. Joint Exhibit 12-L attached hereto is a true copy of the 1950 income tax return of Marc D. and L. Waive Leh.

/s/ BARTON B. BEEK,
Counsel for Petitioners.

/s/ JOHN POTTS BARNES, ECC
Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed April 9, 1956.

[Title of Tax Court and Docket No. 53879.]

AMENDED PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (Ap:LA:AA-CTF 90D:GCE) dated April 23, 1954, and as a basis of their proceeding, allege as follows:

1. Petitioners are individuals with principal office at 620 West Anaheim Street, Long Beach, California. The return for the period herein involved was filed with the Collector for the Sixth District of California.

2. The Notice of Deficiency (a copy of which is attached to the original petition herein and marked

Exhibit A) was mailed to petitioners on April 23, 1954.

3. The deficiency determined by the Commissioner is in income taxes for the calendar year 1950 in the amount of \$24,669.86, all of which is in dispute.

4. The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

(a) Respondent erroneously determined that the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company, a partnership in which petitioner David E. Brown held a 50 per cent interest, constituted ordinary income rather than capital gain as reported on petitioners' return.

5. The facts upon which petitioners rely are as follows:

(a) Petitioners are and at all times material hereto were husband and wife.

(b) At all times pertinent hereto the Progress Company was a partnership composed of petitioner David E. Brown and Marc D. Leh. Petitioner David E. Brown was entitled to 50 per cent of the profits and chargeable with 50 per cent of the losses thereof, and his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than six months was 50 per cent.

(c) On or about July 26, 1950, the Progress Company sold property used in its trade or business. Said property had been held continuously

by the Progress Company for more than six months, to-wit, since January 28, 1948.

(d) Said property consisted of a written contract relating to the purchase of certain quantities of gasoline at specified prices, together with those rights created or transferred thereby.

(e) The terms of said contract were embodied in two letter agreements executed January 28, 1948; copies of said letter agreements are attached to the amended petition of Marc D. Leh in Docket No. 53878 marked Exhibit C and Exhibit D, and are made a part hereof by reference.

(f) The gain realized by the Progress Company from such sale was \$183,330.50.

Wherefore, petitioners pray that this Court hear the proceeding and determine (a) that respondent's determination of the tax is erroneous insofar as the sum of \$183,330.50 paid by Olympic Refining Company to the Progress Company is treated by respondent as ordinary income; (b) that no deficiency exists in petitioners' income tax liability for the taxable year ending December 31, 1950; (c) for such other and further relief as the Court deems just.

Dated: April 13th, 1956.

/s/ DAVID E. BROWN,

In Pro Per.

Duly Verified.

[Endorsed]: T.C.U.S. Filed April 19, 1956.

[Title of Tax Court and Docket No. 53879.]

ANSWER TO AMENDED PETITION

The Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, for answer to the amended petition of the above-named taxpayers, admits and denies as follows:

1. Admits that petitioners are individuals and that the return for the period herein involved was filed with the Collector for the Sixth District of California; denies the remaining allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the Commissioner determined a deficiency in income tax for the calendar year 1950; denies the remaining allegations contained in paragraph 3 of the amended petition.

4. (a) Denies the allegations of error contained in subparagraph (a) of paragraph 4 of the amended petition.

5. (a) and (b) Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the amended petition.

(c) and (d) Denies the allegations contained in subparagraphs (c) and (d) of paragraph 5 of the amended petition.

(e) Denies that the terms of said contract were

embodied in two letter agreements executed January 28, 1948; admits the remaining allegations contained in subparagraph (e) of paragraph 5 of the amended petition.

(f) Denies the allegations contained in subparagraph (f) of paragraph 5 of the amended petition.

6. Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved.

/s/ JOHN POTTS BARNES,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
E. C. Crouter, Assistant Regional Counsel,
R. E. Maiden, Jr., Special Assistant to the Regional Counsel, George E. Constable, Attorney,
Internal Revenue Service, 1135 Subway Terminal Bldg., 417 South Hill Street, Los Angeles 13, California.

[Endorsed]: T.C.U.S. Filed June 20, 1956.

Tax Court of the United States

27 T. C. No. 10

Marc D. Leh and L. Waive Leh, Petitioners, v.
Commissioner of Internal Revenue, Respondent.

David E. Brown and Christabel H. Brown, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket Nos. 53878, 53879. Filed March 11, 1957.

FINDINGS OF FACT AND OPINION

In 1948 a partnership entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership the amount of \$183,-330.50 to cancel and terminate the contract. Held, the respondent correctly determined that the gain resulting from this transaction was taxable as ordinary income and not capital gain.

James L. Wood, Esq., and Barton B. Beek, Esq., for the petitioners in Docket No. 53878.

David E. Brown, pro se, in Docket No. 53879.

George E. Constable, Esq., for the respondent.

The respondent determined the following deficiencies in the income tax of petitioners for the year 1940:

	Deficiency
Marc D. Leh and L. Waive Leh	\$24,669.86
David E. Brown and Christabel	
H. Brown	25,377.04

In each of the proceedings the petitioners claim an overpayment of tax.

The sole issue is whether the amount of \$183,330.50 received in 1950 by a partnership from the Olympic Refining Company is taxable as capital gain or ordinary income.

Other issues raised by the pleadings have been settled by stipulations of the parties.

Findings of Fact

Some of the facts have been stipulated and are incorporated herein by this reference.

The petitioners in each proceeding are husband and wife and residents of Los Angeles, California. They filed their income tax returns for the year 1950 with the collector of internal revenue for the sixth district of California. Marc D. Leh and David E. Brown will hereinafter be referred to as the petitioners.

The Progress Company (hereinafter referred to as Progress) was a general partnership. The members of this partnership were Marc D. Leh and David E. Brown and they shared equally its profits and losses.

Progress was formed in 1940 and thereafter engaged in various businesses, particularly businesses

connected with the petroleum industry. Progress engaged in marketing petroleum products during 1947, 1948, 1949 and 1950.

Olympic Refining Company (hereinafter referred to as Olympic) is a corporation engaged in marketing petroleum products.

On November 19, 1945, Olympic entered into a supply contract with General Petroleum Corporation (hereinafter referred to as General) under the terms of which General was obligated to supply Olympic's requirements of gasoline and other petroleum products up to a maximum of 3,500,000 gallons of gasoline each month, and Olympic was obligated to purchase its entire requirements of gasoline from General without restriction as to quantity. The expiration date of the contract was January 1, 1951, but it contained a clause providing for automatic extension from year to year, subject to termination upon six months' notice by either party. This contract will hereinafter be referred to as the General-Olympic contract.

During the years 1946 and 1947 Olympic's purchases from General averaged 1,000,000 to 1,250,000 gallons of gasoline monthly.

On January 28, 1948, Progress entered into a contract with Olympic (hereinafter referred to as the Progress-Olympic contract). This contract was set forth in two letters bearing that date. One letter addressed to Progress by Olympic was as follows:

We are pleased to submit below our proposal to serve you with your requirements of our gasoline.

Your signature of acceptance acknowledges that you have read and are familiar with the terms and conditions of that certain agreement between Olympic Refining Company and the General Petroleum Corporation of California, dated November 19, 1945, and that the terms, amendments, conditions and provisions are incorporated herein by reference and made a part hereof to all intents and purposes as though the same were set forth in full, except that:

1. The quantity of gasoline will be two and one-quarter million gallons, 10% more or less, subject to our option;

2. The prices you will pay us will be one-half cent per gallon greater than the prices which are set forth in said agreement; and,

3. Gasolines purchased hereunder will not be resold for delivery into the States of Washington and Oregon nor within the territory in the State of California which is embraced within exclusive distributor contracts with the Olympic Refining Company as follows: San Francisco, San Jose, Glendale, Pasadena, and San Diego.

The other letter addressed to Olympic by Progress was as follows:

In consideration of the gasoline contract which we have entered into with your company as of this date, it is understood that, in the event the Olympic Refining Company extends and/or makes a contract for gasolines with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co.

shall have an extension of its agreement on the same terms and conditions, with the exceptions noted in our agreement of this date.

Likewise, if The Progress Co. should negotiate a contract for gasolines similar to the above referred to type of contract with the General Petroleum Corporation of California and/or any other supplier of petroleum products, The Progress Co. will pay to the Olympic Refining Company one-half ($1/2c$) cent per gallon during the life of said contract.

Prior to the execution of the Progress-Olympic contract, Progress and Olympic had entered into a "Distributor's Agreement" by the terms of which Progress was entitled to 350,000 gallons of gasoline per month. The "Distributor's Agreement" was assigned by Progress early in 1948 to Olympic-Progress Oil Co., a corporation controlled by petitioners Marc D. Leh and David E. Brown.

Between 1948, when the Progress-Olympic contract was executed, and 1950, the gasoline market expanded, and, by 1950, gasoline was in short supply in the Southern California area. General, as part of its policy of reducing its supply commitments, entered into negotiations with Olympic in 1950 seeking a reduction of its commitment under the General-Olympic contract, and Olympic, in turn, sought reduction or elimination of its commitment under the Progress-Olympic contract.

On July 26, 1950, an agreement, bearing the caption "Mutual Termination Agreement," was entered into by Progress, as First Party, Olympic-Prog-

ress Oil Co., as Second Party, and Olympic, as Third Party. Therein, after referring to prior agreements of the parties, including the Progress-Olympic contract and the "Distributor's Agreement," it was agreed, in part as follows:

1. Each and all of said agreements above described are hereby mutually declared to be cancelled and terminated as of the close of business on the 31st day of July, 1950 and declared to be of no further force or effect.

2. First Party and Second Party hereby release and discharge Third Party and General Petroleum Corporation of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise.

3. Third Party releases and discharges First Party of and from any and all duties, claims, liabilities or obligations arising out of or in connection with said agreements above described or otherwise; excepting however, that Third Party does not release First Party of or from the following indebtednesses:

(a) The indebtedness in the sum of \$255,277.80 owed by First Party to Third Party as of the close of business on the 24th day of July, 1950, for petroleum products theretofore sold and delivered by Third Party to First Party; and

(b) Any indebtedness of First Party to Third Party for petroleum products sold and delivered by Third Party to First Party up to and including the 31st day of July, 1950, computed at the same

prices used in the computation of said existing indebtedness described in subparagraph (a) above;

First Party agrees to pay said indebtedness or any remaining balance thereof to Third Party on or before the 3rd day of August, 1950.

* * * * *

5. In consideration of the termination of said agreements, as provided in paragraph 1 hereinabove, and in consideration of the releases herein provided for, Third Party shall pay to First Party the sum of \$183,330.50, and to Second Party the sum of \$31,669.50; which said sums may, at the election of Third Party, be paid in cash to Second and Third Parties, respectively, or be paid by crediting the said sums respectively against the respective indebtednesses of First and Second Parties described in paragraphs 3 and 4 hereinabove, which election shall be made by Third Party on or before July 31st.

The amount of \$183,330.50 was paid to Progress during 1950 by crediting this amount to its account with Olympic for gasoline theretofore purchased under the Progress-Olympic contract.

On July 31, 1950, General and Olympic entered into an agreement which provided for the termination of the General-Olympic contract, and on August 1, 1950 they executed a new contract under the terms of which Olympic was entitled to purchase 1,750,000 gallons of gasoline per month. Olympic received from General approximately \$235,000 at the time these agreements were executed.

In the partnership return filed by Progress for

1950, the \$183,330.50 received by it from Olympic was reported as a long-term capital gain and treated as such on the returns filed by petitioners. The respondent determined that this amount constituted ordinary income and that one-half should have been included in the taxable income for 1950 of each petitioner.

Opinion

Raum, Judge: Section 117(j) of the Internal Revenue Code of 1939¹ accords capital gain treat-

¹ Sec. 117. Capital Gains and Losses.

* * * * *

(j) Gains and Losses From Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.—

(1) Definition of Property Used In the Trade or Business.—For the purposes of this subsection, the term “property used in the trade or business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a) (1) (C). * * *

(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the

ment to gains from the sale or exchange of certain "property used in the trade or business" of a taxpayer. Petitioners contend that the right to purchase 2,250,000 gallons of gasoline per month, which Progress acquired from Olympic under the Progress-Olympic contract, was "property used in the trade or business" of Progress; that the transaction of July 26, 1950, constituted a "sale or exchange" of this property; and that gain of \$183,330.50 realized was taxable as capital gain and not ordinary income.

We agree with petitioners that the right of Progress to purchase 2,250,000 gallons of gasoline per month which it acquired under the Progress-Olympic contract falls within the definition of "property used in the trade or business" contained in Section 117(j). We do not agree that the transaction of July 26, 1950, constituted a "sale or exchange" of this property right to Olympic.

The petitioners argue that the rights of Progress under the Progress-Olympic contract were essentially the same as the rights of Olympic under the

power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

General-Olympic contract; that the Progress-Olympic contract was, in substance, an assignment from Olympic to Progress of a portion of Olympic's rights under the General-Olympic contract; that the transaction of July 26, 1950 was, in substance, a transfer from Progress to Olympic of the right to purchase 2,250,000 gallons of gasoline per month from General; and that Olympic paid Progress \$183,330.50 for the transfer of this right. We do not agree with this argument, because Progress never acquired the right, by assignment or otherwise, to purchase gasoline from General under the Progress-Olympic contract. That contract gave Progress the right to have its gasoline requirements supplied by Olympic, and the evidence indicates that its purchases were made from Olympic. The General-Olympic contract was a separate and distinct transaction which gave Olympic the right to purchase gasoline from General, and which provided Olympic with a source of supply which enabled it to enter into contracts to sell gasoline to Progress and others. In the circumstances we cannot agree that the substance of the transaction of July 26, 1950, was a transfer from Progress to Olympic of the right of Progress to purchase 2,250,000 gallons of gasoline per month from General.

On July 26, 1950, Progress had the right under the Progress-Olympic contract to purchase 2,250,000 gallons of gasoline per month from Olympic. Because of a shortage in the supply of gasoline at that time, this right had a substantial value. It

was property which was susceptible of transfer for a valuable consideration, and such a transfer would constitute a "sale or exchange." It was also susceptible of being cancelled or terminated for a valuable consideration, in which event one of the essential elements of a "sale or exchange," a transfer of property, would be lacking.

Progress and Olympic were parties to an agreement entered into on July 26, 1950, which was denominated a "Mutual Termination Agreement." After reciting the prior agreements previously entered into by the parties, including the Progress-Olympic contract, this agreement provided in part for the cancellation and termination of the prior agreements, for the release and discharge of Olympic from any duties or obligations arising out of or in connection with the prior agreements, and for the payment of \$183,330.50 by Olympic to Progress in "consideration of the termination of said agreements * * * and in consideration of the releases herein provided for * * *."

The petitioners urge that the fact that the July 26, 1950 agreement was denominated a "Mutual Termination Agreement" and that the words "cancellation" and "termination" were used therein is not necessarily determinative of the nature of the transaction. We agree, and have carefully considered not only the provisions of the agreement but also the attendant facts and circumstances shown by the evidence. They disclose to our satisfaction that the transaction was not intended to effect a sale by Progress of its rights under the

Progress-Olympic contract to Olympic; that Olympic was desirous of cancelling and terminating those rights; and that the amount of \$183,330.50 was paid to Progress in consideration for their cancellation and termination. In return for this payment Progress released Olympic from the obligation to sell it 2,250,000 gallons of gasoline per month. This release not only ended Olympic's duty to supply this gasoline but also destroyed Progress' rights under the Progress-Olympic contract. They were not transferred to Olympic; they "merely came to an end and vanished." Cf. *Commissioner v. Starr Brothers, Inc.*, 204 F. 2d 673, 674 (C.A.2).

We recognize that controversies in this field have resulted in some rather fine distinctions. Thus, the receipt of money in consideration of the relinquishment of contractual rights which had the consequence of enlarging rights in specific property of the other contracting party has been treated as a "sale or exchange." Cf. *Isadore Golonsky*, 16 T.C. 1450, affirmed, 200 F. 2d 72 (C.A. 3), certiorari denied, 345 U.S. 939; *Louis W. Ray*, 18 T.C. 438, affirmed, 210 F. 2d 390 (C.A. 5), certiorari denied, 348 U.S. 829; *McCue Bros. & Drummond, Inc.*, 19 T.C. 667, affirmed, 210 F. 2d 752 (C.A. 2), certiorari denied, 348 U.S. 829; *Henrietta B. Goff*, 20 T.C. 561, affirmed, 212 F. 2d 875 (C.A. 3), certiorari denied, 348 U.S. 829. Judge A. N. Hand undertook in the *McCue Bros. & Drummond* case to distinguish the two lines of cases; in cases such as *Starr Brothers*, *supra*, and *General Artists Corp. v. Commissioner*, 205 F. 2d 360 (C.A. 2),

certiorari denied, 346 U.S. 866, there was a mere release of a contractual right which "vanished," whereas in the other line of cases, "the right of possession under a lease or otherwise, is a more substantial property right which does not lose its existence when transferred." 210 F. 2d at p. 753. And we attempted to apply the principles of these cases in *Pittston Co.*, 26 T.C. 967, where the relinquishment of contractual obligations resulted in enlarged rights in the other party to dispose of specific coal produced at its mines. We felt that the facts there presented were comparable to the ones in the *Golonsky* and *Goff* line of cases. In the instant case, however, we cannot find such a transfer of rights in property as was presented in those cases.

If these distinctions are not wholly satisfying, it should be remembered that the Supreme Court was requested to issue writs of certiorari in a number of these cases in order to clarify the situation, but it refused to do so. In the circumstances, we must do the best we can with the precedents at hand, and, applying those precedents here, we conclude that the cancellation of the contract rights herein did not constitute a "sale or exchange."

Decisions will be entered under Rule 50.

Served and Entered March 12, 1957.

Tax Court of the United States
Washington

Docket No. 53878

MARC D. LEH and L. WAIVE LEH,
Petitioners,
v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed herein March 11, 1957, directing that decision be entered under Rule 50, the parties, on June 18, 1957, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the year 1950 in the amount of \$20,308.88.

Entered: June 20, 1957.

[Seal] /s/ ARNOLD RAUM,
Judge.

Served and Entered June 21, 1957.

Tax Court of the United States
Washington

Docket No. 53879

DAVID E. BROWN and CHRISTABEL H.
BROWN, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed herein March 11, 1957, directing that decision be entered under Rule 50, the parties, on June 18, 1957, filed an agreed computation for entry of decision. It is therefore

Ordered and Decided: That there is a deficiency in income tax for the year 1950 in the amount of \$21,403.52.

Entered: June 20, 1957.

[Seal] /s/ ARNOLD RAUM,
Judge.

Served and Entered June 21, 1957.

In The United States Court of Appeals
For The Ninth Circuit

Tax Court Docket No. 53878

MARC D. LEH and L. WAIVE LEH, husband
and wife, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Marc D. Leh and L. Waive Leh, husband and wife, the petitioners in this cause, by James L. Wood and Barton B. Beek, their attorneys, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision of The Tax Court of the United States entered on June 20, 1957, pursuant to its Findings of Fact and Opinion (24 T.C. No. 110) filed March 11, 1957, determining a deficiency in petitioner's federal income tax for the calendar year 1950 in the amount of \$20,308.88, and respectfully show:

I.

Petitioners, husband and wife, have been since prior to 1950 and are now residents of Los Angeles County, California. Petitioners filed their joint income tax return for the year 1950 with the Collector of Internal Revenue for the Sixth District of California, which collection district is within the jurisdiction of the United States Court of Ap-

peals for the Ninth Circuit, wherein this review is sought. This petition is filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II.

The nature of the controversy is as follows:

In 1948 a partnership, in which petitioner, Marc D. Leh was one of two equal partners, entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership \$183,330.50 to "cancel and terminate" the contract. In the partnership return filed by the partnership for 1950, the \$183,330.50 was reported as a long-term capital gain, and petitioners' distributive share thereof was so treated on their return for 1950. The Commissioner determined that this amount constituted ordinary income and that one-half thereof should have been reported as ordinary income for 1950 by petitioners.

The sole question presented by this appeal is whether the payment received by the partnership upon disposition of its gasoline supply contract was ordinary income or capital gain, when the payment was received from the partnership's supplier and the transaction took the form of a cancellation of the supply contract by the supplier and the partnership.

Wherefore, petitioners pray that the United States Court of Appeals for the Ninth Circuit review the Findings of Fact and Opinion herein-

above referred to, and the decision entered pursuant thereto, and reverse the determination there made.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Sept. 16, 1957.

In the United States Court of Appeals
for the Ninth Circuit

Tax Court Docket No. 53879

DAVID E. BROWN and CHRISTOBEL H.
BROWN, husband and wife, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

David E. Brown and Christobel H. Brown, husband and wife, the petitioners in this cause, by James L. Wood and Barton B. Beek, their attorneys, hereby petition the United States Court of Appeals for the Ninth Circuit to review the decision of The Tax Court of the United States entered on June 20, 1957, pursuant to its Findings of Fact and Opinion (24 T.C. No. 110) filed March 11, 1957, determining a deficiency in petitioner's federal in-

come tax for the calendar year 1950 in the amount of \$21,403.52, and respectfully show:

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II.

The nature of the controversy is as follows:

In 1948 a partnership, in which petitioner, David E. Brown was one of two equal partners, entered into a contract which gave it the right to purchase from a corporation 2,250,000 gallons of gasoline per month. In 1950, when gasoline was in short supply, the corporation paid the partnership \$183,330.50 to "cancel and terminate" the contract. In the partnership return filed by the partnership for 1950, the \$183,330.50 was reported as a long-term capital gain, and petitioners' distributive share thereof was so treated on their return for 1950. The Commissioner determined that this amount constituted ordinary income and that one-half thereof should have been reported as ordinary income for 1950 by petitioners.

The sole question presented by this appeal is whether the payment received by the partnership upon disposition of its gasoline supply contract was ordinary income or capital gain, when the payment was received from the partnership's supplier and the transaction took the form of a cancellation of the supply contract by the supplier and the partnership.

Wherefore, petitioners pray that the United States Court of Appeals for the Ninth Circuit review the Findings of Fact and Opinion hereinabove referred to, and the decision entered pursuant thereto, and reverse the determination there made.

/s/ JAMES L. WOOD,
Counsel for Petitioners.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Sept. 16, 1957.

The Tax Court of the United States

Docket Nos. 53878 - 53879

MARC D. LEH and L. WAIVE LEH, DAVID
E. BROWN and CHRISTABEL H. BROWN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 9, United States Post Office and

Court House Building, Los Angeles, California.

April 9, 1956—3:30 p.m.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Barton B. Beek and James L. Wood, 433 South Spring Street, Los Angeles, California, appearing for Petitioners Marc D. Leh and L. Waive Leh. David E. Brown, 250 Hillside Road, South Pasadena, California, appearing Per Se. George Constable, Office of Commissioner of Internal Revenue, 1135 Subway Terminal Building, Los Angeles, California, appearing for the Respondent. [1]*

* * * * *

Mr. Beek: We will call Mr. Leh.

Whereupon,

MARC D. LEH

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name and address for the record?

The Witness: Marc D. Leh, 570 Garden Lane, Pasadena, California.

Direct Examination

Q. (By Mr. Beek): You are the petitioner, Mr. Leh? A. Yes.

Q. One of the petitioners, and L. Waive Leh, your co-petitioner, is your wife? [21]

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Marc D. Leh.)

A. Yes.

Q. Can you tell us, Mr. Leh, how long you have been associated with the gasoline business?

A. Since 1924.

Q. In what capacities?

A. Principally in the marketing of petroleum products.

Q. By whom were you employed in 1924?

A. General Petroleum Corporation of California.

Q. How long did that employment continue?

A. Until 1938.

Q. At what time, Mr. Leh, was your partnership with Mr. Brown formed?

A. Early part of 1940.

Q. In between 1938 and 1940, were you associated with the gasoline marketing business, Mr. Leh?

A. Indirectly.

Q. What was your occupation at that time?

A. I was connected with the development of barging of petroleum products up the Columbia River in Oregon for the Tidewater Transportation Company.

Q. After you and Mr. Brown formed The Progress Company, what business did that partnership engage in?

A. It went into various businesses, principally petroleum.

Q. The name of your partnership with Mr. Brown was [22] what, Mr. Leh?

A. The Progress Company.

(Testimony of Marc D. Leh.)

Q. Thank you. When you say that the business of The Progress Company was petroleum, would you describe for us what part of the petroleum business The Progress Company was active in?

A. Principally marketing and affiliated businesses such as petroleum drums, steel drums, and other products connected directly or indirectly with the petroleum industry.

Q. Did The Progress Company engage in retail sales of gasoline?

A. The sales of gasoline to retailers, yes.

Q. I show you now, Mr. Leh, Joint Exhibit 1-A, and ask you whether, prior to January 1948, you were familiar in a general way with that document.

A. Before what date?

Q. Before January 1948, that is, in 1947.

A. Yes, in substance.

Q. What is that document, Mr. Leh? Just describe it in general terms.

A. This is a supply contract between General Petroleum Corporation of California and the Olympic Refining Company, Long Beach, California.

Q. With reference to that contract, Mr. Leh, did you at any time enter into a contract with the Olympic Refining [23] Company?

A. Yes.

Q. I show you now Joint Exhibits 4-D and 5-E, and ask you whether those are the contracts to which you refer.

A. Yes.

Q. For the sake of convenience, Mr. Leh, I will refer to Joint Exhibits 4-D and 5-E as the letter agreements. Those letter agreements constituted

(Testimony of Marc D. Leh.)

gasoline supply contracts between The Progress Company and Olympic Refining Company, did they not? A. They did.

Q. Can you describe briefly the negotiations and the business situation which led to the formation of those contracts?

A. The business negotiations leading to and resulting in the acceptance of these agreements were the result of attempting to write a price clause as appeared from the General Petroleum contract with Olympic, and in order to simplify the matter, we accepted an assignment of part of General Petroleum's supply contract with the Olympic Refining, as stated in 4-D, Exhibit 4-D.

Q. Then prior to January 1948, you were aware that Olympic Refining Company was entitled to take large quantities of gasoline from General Petroleum? A. Yes, sir.

Q. Did you know what quantity Olympic was entitled to take, approximately? [24]

A. Yes.

Q. What was that quantity?

A. Some three and a half million gallons per month.

Q. Did you know whether or not Olympic Refining Company was able to sell all that quantity of gasoline each month?

A. Only by their statement that they were not.

Q. Did you and your partner, Mr. Brown, feel that you could sell that gasoline? A. Yes.

(Testimony of Marc D. Leh.)

Q. What quantity of gasoline was covered by the agreement of January 1948, Mr. Leh?

A. The agreement of January 28, 1948, marked 4-D, specified a quantity of two and one quarter million gallons per month, ten percent, more or less, subject to the option of the Olympic Refining Company.

Q. Those contracts, which we call the letter agreements, the 4-D and 5-E, were held by The Progress Company, a partnership, during their entire life, were they not? A. Yes.

Q. Were they ever assigned by you?

A. Yes, they were held.

Q. They were held by The Progress Company?

A. They were held—would you repeat that question, please? I am confused. [25]

Q. I will rephrase the question. Did The Progress Company ever assign its rights under the letter agreements prior to July of 1950? A. No.

Q. Thank you. I show you now, Mr. Leh, Joint Exhibit 2-B, and ask you to describe—are you familiar with that document, Mr. Leh?

A. Yes.

Q. Will you describe it in general terms?

A. This Exhibit 2-B is entitled "Distributor's Agreement, the Sales Agreement Between Olympic Refining Company and David E. Brown and Marc D. Leh, doing business as The Progress Company."

Q. And the date of that agreement is—

A. October the 20th, 1947, for an area roughly known as the Pasadena area, and the quantity was,

(Testimony of Marc D. Leh.)

I believe—not “believe”—was 350,000 gallons per month.

Q. Thank you. That distributor agreement was in force at the time the letter agreements, Joint Exhibits 4-D and 5-E were entered into?

A. Yes.

Q. I show you now Joint Exhibit 3-C, and ask you if you are familiar with that document.

A. I am.

Q. What was its nature, Mr. Leh? [26]

A. This was an amendment to the distributor's agreement dated October 20, 1947, wherein the quantity and area was increased.

Q. Directing your attention particularly to the third paragraph of this agreement containing the expression, “The territory outlined in Exhibit A attached hereto,” do you recall what “Exhibit A attached hereto” referred to, Mr. Leh?

A. Yes.

Q. What was that?

A. It is my recollection that it referred to an area in Southern California south of the Tehachapi Mountains at the Mexican Border and to the Arizona Border.

Q. Was Exhibit A attached?

A. I believe it was.

Q. Thank you. I show you now Joint Exhibit 6-F, and ask you if you are familiar with that document.

A. Yes, I am.

Q. What is its general nature, Mr. Leh?

(Testimony of Marc D. Leh.)

A. It is a cancellation of the amendment I filed as 3-C.

Q. The one we have just discussed?

A. Yes.

Q. Thank you. I show you now Joint Exhibit 7-G, and ask you if you are familiar with that document.

A. Yes. [27]

Q. And its general nature was——

A. It was an amendment to the distributor's agreement of October 20, 1947, and the date of this amendment is February the 13th, 1948.

Q. Thank you. Now, Mr. Leh, taking together Joint Exhibit 2-B and Joint Exhibits 3-C, 6-F and 7-G, is it correct to state that those four exhibits taken together constitute one contract with its amendments?

A. Yes.

Q. Thank you. Did The Progress Company continue to hold the distributorship agreement, Joint Exhibit 2-B, as amended by the letter agreements that we have been discussing?

A. No.

Q. Did The Progress Company assign that agreement as amended to another entity?

A. Yes.

Q. What was that other entity, Mr. Leh?

A. The Olympic Progress Oil Company.

Q. Do you know who were the principal stockholders of the Olympic Progress Oil Company?

A. Yes.

Q. Will you tell us who they were?

A. It is my recollection that Mr. David E.

(Testimony of Marc D. Leh.)

Brown, Mr. Arthur, Mr. Lee Orr, Mr. Harry Rogers and Marc D. Leh.

Q. Would it be correct to say that you and Mr. Brown [28] controlled Olympic Progress Oil Company?

A. What do you mean by "controlled"?

Q. Would it be correct to say that the management of Olympic Progress Oil Company was under your supervision?

A. Yes.

Q. Thank you. To recapitulate, Mr. Leh, subsequent to the assignment of this distributor agreement, Joint Exhibit 2-B, to the Olympic Progress Oil Company, The Progress Company had no further interest in the distributor's agreement, is that correct?

A. Subsequent to the assignment?

Q. The assignment.

A. No. That is correct, that's correct.

The Court: When was that assignment made?

Mr. Beek: Beg your pardon, your Honor.

The Witness: It was made sometime, in my recollection, the early part of 1948.

Q. (By Mr. Beek): Do you recall the exact date of the assignment, Mr. Leh?

A. No, I do not. My recollection is that Olympic Progress Oil Company was incorporated in 1947, and shortly thereafter, this distributor's agreement to The Progress Company was assigned to the Olympic Progress Oil Company.

Q. Now, at the time of that assignment, Mr. Leh, [29] was there any assignment of the letter

(Testimony of Marc D. Leh.)

agreements, which are Joint Exhibits 4-D and 5-E?

A. No.

The Court: Did the assignment occur prior to the receipt of Exhibits 4-D and 5-E?

The Witness: My recollection is that it was—or was concurrent with the letter of January 28th, where the first reference on the Olympic Refining Company, dated February 13th, 1948——

The Court: That is in Exhibit 7-G?

The Witness: Exhibit 7-G amends the price clause of Exhibit 2-B, and it refers to this letter of January the 28th, 1948. I am not positive——

Mr. Beek: I think we will clarify this in a moment, your Honor.

Q. (By Mr. Beek): Then may I ask you: There were two separate contracts, one we called the distributor's agreement, which was assigned to Olympic Progress Oil Company, a corporation; the other was the supply contract created by the letter agreements 4-D and 5-E, and that was held by The Progress Company, the partnership, is that correct, Mr. Leh? A. That is correct.

Q. Referring now to the contracts which are embodied in the letter agreements, Joint Exhibits 4-D and 5-E, what [30] was the quantity of gasoline which The Progress Company was entitled to purchase under those contracts?

A. Two and one quarter million gallons, ten percent more or less.

Q. Was that full amount purchased in each

(Testimony of Marc D. Leh.)

month subsequent to the execution of those contracts?

A. It increased progressively to the full quantity.

Q. During the first month, then, two and a quarter million gallons was not purchased, is that correct?

A. No. A very little amount, if any.

Q. In the early part of 1950, how much gasoline was purchased under that contract?

A. It is my recollection that we were taking the maximum allowed us by the Olympic Refining Company, which would be two million, twenty-five thousand gallons per month.

Q. You say that in 1950, the full amount was taken under these letter agreements. Was the full amount taken right up to the time of the so-called mutual termination agreement in July of 1950?

A. It is my recollection that up to the time that we sold our supply contract, we were taking the full amount under this contract. Now, if I may comment: The letter agreement refers to two and one quarter million gallons, ten percent more or less. That was reduced to the minimum by Olympic Refining Company, so we were taking the amount allowed [31] by them of two million twenty-five thousand gallons per month.

Q. Thank you. Can you describe now, Mr. Leh, in general terms, the negotiations which led up to what you have termed the sale of your supply contract?

(Testimony of Marc D. Leh.)

A. It is my recollection that either late 1949 or early 1950, Olympic Refining Company informed me that their supplier, the General Petroleum Corporation, due to demands for the South Pacific, needed more gasoline, and they were confronted with either enlarging their refinery or going into the open market to purchase gasoline, therefore, they were reviewing all of their supply contracts, of which the Olympic Refining contract was one, and came to us to ask if we were interested in selling our supply contract. Subsequent to that, why, negotiations were started, and ended in a sale sometime in July 1950.

Q. I show you now, Mr. Leh, Joint Exhibit 8-H, entitled "Mutual Termination Agreement," and ask you whether you are familiar with that document.

A. I am.

Q. Is that the document by which the sale of your supply contract was consummated?

A. It is.

Q. Do you know, Mr. Leh, who wrote that document?

A. I was informed by Mr. Paradise that he had written it. [32]

Q. Did you submit at any time to Olympic Refining Company, or to Mr. Paradise, a draft of this document?

A. A draft of this Exhibit 8-H?

Q. That's right. A. No, sir.

Q. The language of this document, then, was not suggested by you, was it? A. No, sir.

(Testimony of Marc D. Leh.)

Q. I will ask you now to turn to Page 3 of Joint Exhibit 8-H, and to Paragraph 5 appearing on Page 3, reading as follows:

“In consideration of the termination of said agreements as provided in Paragraph 1 herein above, and in consideration of the releases herein provided for, third party shall pay to first party the sum of \$183,330.50, and to second party, the sum of \$31,669.50.”

I will ask you, Mr. Leh, first of all, who was the third party? I will suggest you refer to Page 1.

A. The third party—Olympic Refining Company was the third party.

Q. And the first party was The Progress Company, a partnership, is that correct?

A. The Progress Company, and the second party was Olympic Progress Oil Company. [33]

Q. Can you tell us, Mr. Leh—can you tell us, first, what was the total consideration paid by third party?

A. \$215,000.

Q. Thank you. And that was divided into the sums of \$183,330.50 and the other sum of \$31,669.50. How was that division determined, Mr. Leh?

A. In direct ratio of the gasoline supplied to the two entities from Olympic Refining Company.

Q. The first party, The Progress Company, received \$183,330.50, is that correct?

A. That is correct.

Q. And they were entitled to receive how much gasoline?

A. They were entitled to receive two million

(Testimony of Marc D. Leh.)

two hundred fifty thousand gallons, ten percent more or less at the option of the Olympic Refining.

Q. Thank you. The sum of \$31,669.50 was paid to Olympic Progress Oil Company, is that correct?

A. That is correct.

Q. How much gasoline was Olympic Progress Oil Company entitled to take?

A. Three hundred fifty thousand gallons per month.

Q. Thank you. Referring now, Mr. Leh, to the total consideration of \$215,000, which passed subject to this mutual termination agreement, Joint Exhibit 8-H, was that consideration bargained for by you and Mr. Brown as a single [34] sum?

A. I bargained for it, yes.

Q. Can you tell us how that figure of \$215,000 was arrived at?

A. It was over a period of several months. My first asking price for the partnership—my recollection was that it was in the neighborhood of \$600,000, and over a period of time, why, we negotiated and came to a figure, I believe—a grand total figure of \$275,000, and at the request of the Olympic Refining Company, gave them an option for \$275,000, and then at a later time, on or about July 25th, we agreed that a purchase price of \$215,000 for the distributor's agreement and our supply—the assignment of our supply contract, of this supply contract, would be the sum.

Q. Thank you. It would be correct, then, to say that the figure of \$215,000 was reached as a result

(Testimony of Marc D. Leh.)

of bargaining back and forth between the parties; is that a true or correct statement?

A. That is true, and it took time, for I was informed that negotiations were being carried on with General Petroleum Corporation by Olympic at the same time that they were negotiating with us.

Q. What were you advised as to the nature of those negotiations, Mr. Leh?

A. I stated earlier that with the demand of petroleum [35] products in the South Pacific, General Petroleum Corporation needed more gasoline and was trying to either obtain it by purchase of supply contracts, or any source available, or enlarge their refinery, and that is what prompted Olympic Refining Company to negotiate it with us.

The Court: Did Olympic do any refining?

The Witness: They had a refinery, your Honor, but at that time, I do not believe it was operating.

The Court: So that it was merely a middleman as between your organization and General Petroleum?

The Witness: Yes, sir.

Q. (By Mr. Beek): Did you, when you negotiated this figure of \$215,000, know what your profits had been for the prior year of operation?

A. No, not exactly. I knew we were making money, but I didn't know the exact amount, don't know at this moment.

Q. Did you then know or have any exact way of estimating what your profits would be for the following year of operation? A. No.

(Testimony of Marc D. Leh.)

Q. Did you, in negotiating the figure of \$215,000, make any attempt to determine what profit you would make if you did not sell this supply contract?

A. I didn't hear the start of that question. [36]

Q. Perhaps I should rephrase it. Did you, while negotiating this figure of \$215,000, attempt to determine what your profits would be if you did not sell the supply contract?

A. No, because there's no guaranteed profits in the contract.

Q. Did you at that time know how long your supply contract would run?

A. In my opinion, as a layman, the termination of that agreement was rather vague, the General Petroleum agreement. We had reason to suspect that it could run until 1951 or 1952, depending on how you interpreted the cancellation clause from General Petroleum to the Olympic Refining Company.

Q. You referred to the cancellation clause from General Petroleum to Olympic Refining Company. Are you referring to a clause in Joint Exhibit 1-A?

A. I am referring to a cancellation clause in 1-A, of which we took 4-D and make it a part of this agreement.

Q. Was it your understanding that under your supply contract you would be entitled to continue taking gasoline from Olympic Refining Company in the event that Olympic Refining Company secured a new contract with General Petroleum?

A. Yes.

(Testimony of Marc D. Leh.)

Q. The life of your agreement, then, depended on several variables, did it not? A. Yes. [37]

Q. What market factors influenced the profits that you would make under that supply contract, Mr. Leh?

A. What market factors influenced the profits?

Q. That's right.

A. Well, the shorter the supply position of gasoline, the more profits would be made.

Q. Is the supply position of gasoline readily predictable for more than, say, two months in advance?

A. Oh, you might forecast it as much as six months, two, three, four, five, six months.

Q. At the most, then, you would not be able to estimate your profits from such a supply contract for more than six months?

Mr. Constable: I am going to object to leading the witness.

The Court: I think the last question or two were unduly leading.

Q. (By Mr. Beek): Subsequent to July 26, 1950, which is the date of Joint Exhibit 8-H, did The Progress Company continue in the gasoline business, Mr. Leh?

A. No. We terminated our wholesale gasoline business with the sale of our supply contract to the Olympic Refining Company.

Q. Can you tell me briefly why you didn't continue [38] the gasoline business?

A. We no longer had a supply of gasoline.

(Testimony of Marc D. Leh.)

Q. Mr. Leh, I'd like you to look again at Joint Exhibit 8-H, the mutual termination agreement. Turning to Page 2 in the third paragraph headed "Whereas," reference is made to certain claims and demands against Olympic Refining Company and/or General Petroleum Corporation.

These claims and demands, Mr. Leh, can you tell us in general terms what this language refers to?

A. Generally, you have to interpret it in the light of conditions existing as of that time, which was in 1949 and 1950, and with the ambiguous price clause in the General Petroleum-Olympic Refining contract, you constantly have conflict for a better price the moment you start doing business with an oil company, and the buyer is trying to reduce the price and the seller is trying to increase it, and the conflict, I think, continues on.

I don't recall—I noticed here for the first time that General Petroleum Corporation is named in here—I don't know that I ever talked to General Petroleum Corporation as to a better price.

Q. Now, the third paragraph below the paragraph we just discussed, Mr. Leh, says that:

"First and second party hereby release and discharge third party and General Petroleum [39] Corporation of and from all duties, claims, liabilities or obligations."

The word "claims," in that paragraph, Mr. Leh, does that have any particular meaning to you?

A. I don't know. I don't know what the word—

(Testimony of Marc D. Leh.)

I think I know what the word "claims" means to me. We had a beef about the prices.

Q. Mr. Leh, was any part of the consideration of \$215,000 which you and your partner and your corporation received under this agreement, paid for these claims and demands?

A. Not to my knowledge.

Q. Did you at the time this contract was executed have an opinion as to the value, if any, of such claims and demands?

A. I had no value nor an opinion.

Mr. Beek: Mr. Clerk, I will now hand you a carbon copy, what purports to be a carbon copy of a letter, and ask that it be marked.

The Clerk: 16 for identification.

(The document above referred to was marked
Petitioners' Exhibit No. 16 for identification.)

Q. (By Mr. Beek): Mr. Leh, I now show you what purports to be a carbon copy of a letter, and ask you if you have even seen [40] such a letter.

A. Yes.

Q. Can you describe it, please?

A. It is a letter that I wrote as a partner of The Progress Company to the Olympic Refining Company, June 26, 1950, and which, in compliance with Olympic Refining Company's request, I have granted them an option with which to purchase our supply contract and terminate our business relations. This obligation was for a sum—in two sums: \$250,000 under one condition, and \$275,000 on another condition, the option to expire July 7, 1950.

(Testimony of Marc D. Leh.)

Q. You say, Mr. Leh, that you wrote that letter. By that, do you mean that you dictated the letter?

A. Yes, sir.

Q. Did you see the original of that letter, Mr. Leh, after you had dictated it?

A. Yes. I believe I signed it.

Q. And after you signed it, what did you do with it, Mr. Leh?

A. It was either mailed or delivered direct to the Olympic Refining Company.

Mr. Beek: The Petitioners will offer 16 for identification into evidence.

Mr. Constable: No objection.

The Court: Admitted. [41]

(The document heretofore marked Petitioners' Exhibit No. 16 was received in evidence.)

Q. (By Mr. Beek): Referring again to Petitioners' Exhibit 16 in evidence, I call your attention now to the last paragraph in that letter and ask you to read it, Mr. Leh.

A. "The above options do not state the measure of damages which we have suffered as a result of your overcharging us since January 1950. However, should you accept either of the options above, we will give you formal releases in accordance with the option you have accepted."

Q. Thank you. This paragraph contains the expression "overcharging us." What did you mean, Mr. Leh, by that expression when you wrote the letter?

A. I believe I testified two or three times here

(Testimony of Marc D. Leh.)

already about the arguments existing of the seller and buyer on prices of gasoline, continuing beefs—a slang phrase.

Q. And this expression, then, and in fact, this paragraph refers to those disagreements to which you have testified, is that correct?

A. Yes.

The Court: Was that based on the theory that you were being charged a greater differential than the half cent, or was it based upon the base price?

The Witness: No. I do not believe on the half a [42] cent, but we were fluctuating in price wars up and down. The market was fluctuating, and it was difficult to obtain just where you stood under the formula of the General Petroleum contract to the Olympic Refining under that clause, and possibly with Olympic Refining, there were arguments as to what we should be charged.

Q. (By Mr. Beek): I notice, Mr. Leh, that this letter bears the date just one month prior to the execution of Joint Exhibit 8-H, the mutual termination agreement. Would you say, Mr. Leh, that this letter was written early in your negotiations?

A. Oh, no. Negotiations were coming pretty well to an understanding on this date.

Q. Mr. Leh, at the time the mutual termination agreement, Joint Exhibit 8-H, was entered into, and prior thereto during the negotiations to which we have testified, were you aware of any negotiations conducted between Olympic Refining Company and General Petroleum Corporation?

(Testimony of Marc D. Leh.)

A. Yes, by utterances from officers of the Olympic Refining Company.

Q. Were those utterances made a part of your negotiations with Olympic Refining Company?

A. Yes.

Q. What was your understanding at that time of the negotiations between Olympic Refining Company and General [43] Petroleum Corporation?

A. That General Petroleum Corporation was obtaining this supply contract, and, therefore, were paying for it.

Q. Do you know, Mr. Leh, what, if any, change in the contractual relations between the Olympic Refining Company and General Petroleum Corporation took place at or about the time of the execution of your mutual termination agreement?

A. I was informed by the Olympic Refining Company that their contract with General Petroleum had been reduced in an amount equal to or approximately equal to the amount we had sold.

Q. Did they inform you whether or not any cash consideration passed in that transaction?

A. Yes.

Q. How much and to whom?

A. They didn't tell me at that time.

Q. You testified a few moments ago that when you first began negotiating for the sale of your supply contract, you started out at a figure of \$600,000. How did you arrive at that figure, Mr. Leh?

A. Well, frankly, it sounds odd coming back to

(Testimony of Marc D. Leh.)

two hundred fifteen, but that seemed like a pretty fair price for it. Talking to the industry, and the tightness of the market, and the situation, world affairs, economy, the demand for gasoline, it looked as if we had a supply position that was [44] rather valuable.

Q. Then the final figure of \$215,000 represented as far down as you would go, is that correct?

A. That's right.

Q. How did you arrive at the figure of \$275,000, which is referred to in the letter of June 26, 1950, Petitioners' Exhibit 16?

A. After negotiations had proceeded for a while, Olympic Refining Company was desirous of us giving them some sort of a tangible option with which to negotiate with General Petroleum, and we had at that time on June 26th reached the level of \$275,000, and that is the basis for which the option was granted to them.

Mr. Beek: I believe that is all.

The Court: We will reconvene tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:00 o'clock, p.m., an adjournment was taken until 10:00 o'clock a.m., April 10, 1956.) [45]

Proceedings

Whereupon,

MARC D. LEH

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Constable): Mr. Leh, will you describe what the operations of The Progress Company consisted of in 1950?

A. It was a co-partnership, and in the early part of 1950, we were in the marketing of gasoline. We had holdings as individuals, and, I believe, as a partnership, holdings in a ranch operation, and I believe we were in—possibly in the process of manufacturing batteries.

Q. Pardon me?

A. Batteries, electrical batteries.

Q. Will you describe your operations in connection with petroleum products, how your operations were carried out?

A. We had a supply contract from Olympic Refining Company, and sold gasoline to buyers of gasoline.

Q. Did you have any equipment that you used in connection with the sale of this gasoline?

A. You mean like adding machines or——

Q. I am referring to trucks or storage facilities.

A. No, sir.

Q. Was your function more or less that of a broker?

A. No, sir.

(Testimony of Marc D. Leh.)

Q. Were the products taken directly from Olympic Refining Company and then delivered to your retailers?

A. We took the product from Olympic Refinery and delivered it to the retailers or wholesalers.

Q. How were the deliveries made, Mr. Leh, if you had no equipment?

A. By truck and trailers, common carriers, and some were sold F.O.B. the rack, Olympic rack, loading rack.

Q. Well, then, The Progress Company had no facilities, no equipment other than office furniture and fixtures, which was used in connection with the contracts in question, is that correct?

A. No, it is not correct, because we had under hire trucks and delivery equipment.

Q. Did you rent these trucks?

A. On each individual trip, yes, on some of our sales.

Q. The rental was made, then, just for each delivery, is that correct?

A. The same—I may just illustrate this way: That if I had 10,000 gallons of gasoline to haul from X to Y, I would call up a freight line and retain that freight line to pick up my commodity at X and haul it to Y. [49]

Q. You paid them on a standard rate basis for carrying per gallon?

A. Regular commission rate. And then some was sold F.O.B. the loading rack at the Olympic Refining Plant.

(Testimony of Marc D. Leh.)

You see, it is customary, I mean in that type of no brand or rebrand business, that some of the dealers have their own trucks, and to minimize their delivery costs and operations, they come and get their own gasoline for their stations, so the title of the gasoline can pass at the Olympic Refining rack.

Q. Did you have a regularly designated group of accounts that you sold to, or did you sell to anyone who would buy?

A. Sell to anybody that would buy.

Q. Will you describe the operation of Olympic Progress Oil Company? As I understand, that is the corporation?

A. It was similar, in my recollection, to the operation of The Progress Company.

Q. Was it different in any respect?

A. It operated under a different agreement with amendments — no — I would say that it operated identically the same. When I say operating, I am referring to the sales method—that is the line of your questioning—I am not commenting as to the contractual relations between Olympic Progress Oil Company and Olympic Refining Company. [50]

Q. Mr. Leh, do you recall on July 14, 1954, that you signed a sworn statement which was filed with this court in the form of a petition wherein you recited certain facts to be true in connection with this case?

A. I remember signing—for Mr. Vander Horst, do you mean?

(Testimony of Marc D. Leh.)

Mr. Constable: Your Honor, may I use the original petition which was filed?

Q. (By Mr. Constable): Mr. Leh, I refer you now to the original petition which was filed in Docket 53878, and which bears, I believe, your signature on Page 5. Do you recall signing that document? A. I do.

Q. Were you familiar with the facts that are recited therein beginning at Paragraph 5 on Page 2? A. Yes.

Q. Do the facts as recited in that petition state that the mutual termination agreement known as Exhibit 8 purported to cancel, as far as The Progress Company was concerned, the agreement shown as Exhibit 1-A?

A. Yes, that is correct.

Mr. Beek: Just a moment. Your Honor, I would like to ask Mr. Constable: Did you intend to refer to Exhibit 1-A, Mr. Constable? That is a contract to which Mr. Leh and Mr. Brown were not parties. [51]

Mr. Constable: Well, I will withdraw that question, your Honor.

Q. (By Mr. Constable): It is true, isn't it, Mr. Leh, that the facts recited in the petition state that the mutual termination agreement shown as Exhibit 8 purports to cancel any rights that the Progress Company had under the agreements known as Exhibit 3-C and 4-D—correction—4-D and 5-E?

A. That stated that it cancelled Exhibit 1 and 4-D?

(Testimony of Marc D. Leh.)

Q. Well, let me refresh you, Mr. Leh——

A. I am frankly a little confused.

Q. I think your testimony yesterday was to the effect that in November 19, 1945, you were familiar—strike that.

Your testimony yesterday was to the effect that you were familiar with an agreement of November 19, 1945, shown as Exhibit 1, between General Petroleum and Olympic Refining, is that correct?

A. That is correct.

Q. And that is known as Exhibit 1?

A. That is right.

Q. You also testified that you were familiar with a distributor's contract known as Exhibit 2-B, dated October 20, 1947?

A. That's correct.

Q. I think your testimony was to the effect that [52] Exhibit 1-A was ultimately—correction—that the distributor's contract between Olympic Refining, known as Exhibit 2-B—between Olympic Refining and The Progress Company was assigned by The Progress Company to Olympic Progress Company, the corporation?

A. The Olympic Progress Oil Company, yes.

Q. Now, is it not true that the facts stated in your petition recite that the \$183,000 payment in question was made to The Progress Company for the cancellation of The Progress Company's rights under Exhibit 2-B?

A. No. I don't see that.

(Testimony of Marc D. Leh.)

The Court: That is apparently what it states. The question is whether it states it accurately.

Mr. Beek: We are willing to stipulate that that is what it states.

The Court: It doesn't use the symbols 2-B, but it refers to the distributor's agreement.

The Witness: And it is dated October 20, 1947.

Mr. Constable: That's correct.

The Witness: And I signed this agreement on this petition prepared by our certified public accountant, Mr. Vander Horst, at that time, who was handling our cash matters.

Mr. Constable: That is correct.

Q. (By Mr. Constable): You are familiar, are you not, with the amended [53] petition that was filed with the Court yesterday?

A. Are you referring to that stipulation, you mean?

Q. Referring to the amended petition in the case of Docket 53878, and particularly to the facts beginning in Paragraph 5 on Page 2, and to your signature on Page 5. A. Yes.

Q. Referring to those two petitions, Mr. Leh, are the facts in them inconsistently stated?

A. Yes, I would say it were. They are inconsistent.

Q. Both of the facts were sworn to by you, is that correct? A. That is correct.

Q. Which of the facts — which of your sworn statements is true, Mr. Leh?

A. The only statement that is true is the one

(Testimony of Marc D. Leh.)

that is supported by the factual evidence of the contracts themselves. I didn't prepare either document.

Q. Did you read the documents before you signed them?

A. Yes, sir. I read them in 1954, and, to the best of my belief, that was a statement that was true.

Q. What caused you to change your belief in the facts between 1954 and yesterday?

A. First, in Mr. Vander Horst's preparation of our tax matter, prepared the original petition which I signed. Upon examination of the factual transfers and the dates and [54] the documents involved, it caused us to alter our petition.

Q. When you signed the original petition, were you aware of all the exhibits which are now in evidence? A. I believe I was.

Q. At what date did you finally believe that the rights which were cancelled by Exhibit 8 arose under Exhibits 4-D and 5-E?

A. What was that question again, please?

Q. Now, as I understand it, the facts stated in your amended petition are that any rights which The Progress Company had which were cancelled by the mutual termination agreement were those rights existent under Exhibits 4-D and 5-E. Is that correct? A. That is right.

Q. And you have so stated in your amended petition? A. That is correct.

Q. At what date did you form your belief of the facts stated in your amended petition?

(Testimony of Marc D. Leh.)

A. I think I have always had that same belief. I have never changed my belief. The petition was improperly drawn in the first instance in 1954. It did not support the factual conditions.

Q. Did you know that it was improperly drawn?

A. No, I did not at the time.

Q. And yet you read the facts alleged in the petition? [55]

A. Yes. I read the facts, and there was a reference there to \$183,000, which was in accordance with The Progress Company's settlement of the sale from Olympic Refining Company.

Mr. Constable: Will you mark this?

The Clerk: Exhibit P for identification.

(The document above-referred to was marked Respondent's Exhibit P for identification.)

Q. (By Mr. Constable): Mr. Leh, I show you what is marked as Exhibit P. Do you know what that document is? A. Yes.

Q. Is your signature affixed to Page 2?

A. Yes, that is my signature.

Q. Now, this document is a transmittal, is it not, by The Progress Company to Mr. Vander Horst of your file concerning the termination of your distributor's agreement? Is that not correct?

A. That is correct.

Q. On Page 2, you tell Mr. Vander Horst, do you not, that the file sets forth the conclusion of your gasoline distributorship and termination of your sales in the retail business from Olympic Refining Company? A. That is right.

(Testimony of Marc D. Leh.)

Q. This document refers to the distributor's agreement, does it not? [56]

A. It refers to our file concerning the termination of our distributor's agreement, which consists of the following, and enumerates the financial transaction. It refers to a file of our distributor's agreement.

Q. What distributor's agreement is it that you are referring to in this letter, Mr. Leh?

A. I would presume I was referring to the entire file of all of our agreement or multiplicity of agreements with the Olympic Refining Company, because I sent our whole file to him, according to this letter.

Q. Does it not also purport to contain data in connection with Olympic Progress Oil Company?

A. Yes.

Q. In fact, Mr. Leh, was not the contracts between The Progress Company and Olympic Progress Company with Olympic Refining Company bundled pretty much into one group of contracts and transactions? A. No, sir.

Q. Well, now, why is The Progress Company purporting to handle the affairs here of the Olympic Progress Company?

A. Because I was one of the principal stockholders of the Olympic Progress Oil Company.

Mr. Constable: I will offer Exhibit P into evidence, your Honor.

Mr. Beek: We will object to the introduction of [57] Exhibit P on the grounds that it purports only

(Testimony of Marc D. Leh.)

to be a letter of transmittal from petitioner to his accountant. It doesn't purport to accurately describe the nature of the documents which were enclosed therewith, and those documents are the best evidence of their contents. It is immaterial.

The Court: I will receive it in evidence for whatever it may be worth.

(The document heretofore marked Respondent's Exhibit P was received in evidence.)

Mr. Beek: We will stipulate that this is a true copy.

Mr. Constable: Will you mark this?

The Clerk: Exhibit Q for identification.

(The document above-referred to was marked Respondent's Exhibit Q for identification.)

Mr. Constable: Respondent offers to stipulate that Exhibit Q for identification is a true copy of a certificate of resolution by the Olympic Refining Company.

Mr. Beek: So stipulate.

The Court: Are you offering it?

Mr. Constable: Your Honor, yes, I will offer it at this time.

Mr. Beek: No objection, your Honor.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit Q was received in evidence.)

Mr. Constable: Will you mark this?

The Clerk: Exhibit R for identification.

(The document above-referred to was marked Respondent's Exhibit R for identification.)

(Testimony of Marc D. Leh.)

Mr. Beek: May I show the document to the witness?

Mr. Constable: This would be off the record, if we may.

The Court: Off the record.

(Discussion off the record.)

The Court: On the record.

Mr. Constable: The respondent offers to stipulate that Exhibit R is a true copy of the minutes of the Board of Directors' meeting of the Olympic Progress Oil Company.

Mr. Beek: So stipulate.

Mr. Constable: And I will offer it into evidence, your Honor.

The Court: It will be received.

(The document heretofore marked Respondent's Exhibit R was received in evidence.)

Q. (By Mr. Constable): Mr. Leh, when the Olympic Refining Company and The Progress Company and the Olympic-Progress Company entered into the mutual termination agreement, Exhibit 8-H, which of these companies initiated the negotiations? A. Olympic Refining Company.

Q. Was The Progress Company interested in getting out of the Oil Business?

A. It is difficult for me to answer. "Getting out of the oil business," what is meant by that? Did we have our oil activities up for sale?

Q. Was The Progress Company interested in terminating its activities in connection with the sale of gasoline as it had been in the past?

(Testimony of Marc D. Leh.)

A. No.

Q. Was The Progress Company in the retail distribution of gasoline? Would that be a description of its function?

A. I don't believe it would. They were selling gasoline to retailers. That is a matter of definition from one oil man to another, but I would say that we were buying gasoline at wholesale and selling to retailers and other wholesalers.

Q. In 1950, was The Progress Company interested in getting out of any phase of the oil business?

A. Not prior to the negotiations with the Olympic Refining Company.

Q. After the Olympic Refining Company initiated the negotiations for the termination agreement known as Exhibit 8-H, did The Progress Company then become interested in getting out of the oil business? A. Yes. [60]

Q. What caused this change of mind?

A. The possibility of sale of the supply contract in the form as they use it, "termination agreement."

Q. Well, then, the termination agreement itself, that was the motive for The Progress Company wishing to get out of the oil business, is that correct? A. No, it is not correct.

Q. What, other than the contract, was involved?

A. It was a cash consideration.

Q. Were there any other factors, other than the cash consideration and the mutual termination

(Testimony of Marc D. Leh.)

agreement, which prompted The Progress Company to terminate its activities in the oil industry?

A. I commented yesterday that at the time you enter in a supply contract with a supplier, the buyer immediately tries to get a lower price and the seller tries to get a higher price, and a conflict takes place constantly. There were matters that were discussed; as to what substance they had in the form of valuation, I can't place on them. The only valuation of this termination or sale agreement that appealed to me was the possibility of realizing for the total contract some \$200,000, when, in my opinion, we had reached an economic peak as to the value of the supply contract.

Q. I believe you testified that Olympic Refining Company paid a sum total of \$215,000 for the termination of [61] contracts with The Progress Company and Olympic Refining Company, is that correct?

A. Yes. They paid \$215,000 in accordance with this exhibit marked 8-H.

Q. I think you also testified that these amounts were divided \$183,000 to The Progress Company and \$31,000 odd, to Olympic Progress Company.

A. That is correct.

Q. How was that split made, Mr. Leh?

A. In direct ratio to the gasoline under the contract. Would you like to have me illustrate that?

Q. No. That is sufficient.

Referring to Exhibit 4-D, I notice that the quan-

(Testimony of Marc D. Leh.)

tity of gasoline is two and one quarter million gallons. A. Yes.

Q. Is that per month or per year or for what period of time?

A. Per month, because it specifies in the General Petroleum contract, of which this is part of an assignment, "Per month." The quantity is named per month in here.

I can't locate it right now, but it is per month.

Q. Referring to Exhibit 2-B and to Page 4 therein, what are the total gallons of gasoline which are to be sold under Exhibit 2-B?

A. 350,000 gallons per month. [62]

Q. Are you referring now to Page 4?

A. Yes, sir.

Q. Are you making a computation from Paragraph 6?

A. No. It says, "Distributor shall take deliveries in fairly even monthly quantities,"—well, yes. You are talking annually. The other you wanted by the month. That was the reason I was carrying this other by the month.

Q. Will you explain what is meant by Paragraph 6 of Exhibit 2-B?

A. Well, I think the paragraph speaks for itself. The total shall be taken in fairly even monthly quantities of 4,200,000 gallons per year, or 350,000 gallons per month. That is the reason that I made that calculation.

Q. Therefore, the split of \$183,000 and \$31,000

(Testimony of Marc D. Leh.)

is made on the ratio of the gallonages which we have just been referring to, is that not correct?

A. That is correct.

Mr. Constable: Will you mark this?

The Clerk: Exhibit S for identification.

(The document above-refererd to was marked Respondent's Exhibit S for identification.)

The Witness: On this ratio—may I offer a statement—that the quantity of gasoline under the 2,250,000, if you will recall my testimony yesterday, I kept referring to 2,025,000, because that was the quantity that [63] was given us after the Olympic Refining Oil Company exercised their option to take down the ten per cent, so the quantity would not be 2,250,000 to 350,000 to arrive at this ratio, but 2,025,000. I believe that is the figure. Anyway, it was ten per cent less than the 2,250,000.

Q. (By Mr. Constable): I show you what is marked Exhibit S, Mr. Leh, and ask you if you know what it is.

A. Yes. That is my signature, and I remember the letter.

Q. Your signature is on Page 2? A. Yes.

Q. This letter refers, does it not, to certain of the contracts which are shown by the exhibits in this case? A. Yes.

Mr. Constable: I will offer Exhibit S into evidence, your Honor.

Mr. Beek: Objected to as immaterial, your Honor.

Mr. Constable: Your Honor, respondent is con-

(Testimony of Marc D. Leh.)

cerned about the wording in Paragraph 4 of the letter wherein Mr. Leh, for The Progress Company, makes certain statements concerning The Progress Company's attitude towards getting out of the retail distribution of gasoline.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit S was received in evidence.) [64]

Q. (By Mr. Constable): Mr. Leh, with regard to the payment of \$215,000, as I understand, The Progress Company owed Olympic Refining a certain sum of money, is that not correct, on or about the date of the termination of these contracts?

A. Yes, I believe that is true.

Q. When you refer to a payment, actually what occurred was that there was simply a credit given on Olympic Refining Company's books for the amounts set out in the termination agreement shown as Exhibit 8-H, is that right?

A. Yes, that is true, but the net result is that \$215,000 passed between the two parties or the three parties.

Q. Do you know how much was owed by The Progress Company and how much was owed by Olympic Progress Company at the termination date?

A. I do not recall at this time, except that it was probably a combined figure of around \$250,000.

Q. How did that figure arise, Mr. Leh?

A. How did it arise?

Q. Yes.

(Testimony of Marc D. Leh.)

A. I suppose as a result of billing from Olympic Refining Company.

Q. Exhibit 8-H, which you have before you, refers to an assignment—looking at the last paragraph on Page 1—assignment of a contract dated October 20, 1947, known as the [65] distributor's agreement, which is Exhibit 2-B. That refers to the assignment of that contract by The Progress Company to the Olympic Progress Oil Company, is that not correct? A. That's correct.

Q. Now, that was a written assignment, wasn't it, Mr. Leh? A. I believe it was, sir.

Q. Do you have a copy of that assignment in court? A. No, I do not.

Q. What was paid for that assignment?

A. None that I can recall.

Q. Was there any sum of money paid?

A. Not to my knowledge.

Q. Referring to all of these agreements with the exception of Exhibit 8-H, there was no money paid at the inception of any of these agreements, with the exception of Exhibit 8-H, isn't that correct?

A. I am a bit confused. No money paid for what?

Q. There was no consideration in the inception of the contract, other than the mutual promises of the parties?

A. Well, I don't know what consideration is, but we signed an agreement, and Olympic Refining Company signed an agreement, for the purpose of going into business, the petroleum business.

(Testimony of Marc D. Leh.)

Q. Referring to Exhibit 2-B, the distributor's [66] agreement, did either of the parties at the inception of this agreement pay the other any sum of money? A. As currency, no.

Q. Was money paid in any other form than currency?

A. The reason that I say that is that to me, that when this contract became operative, we paid them money as a result of this contract. I don't—we didn't actually pay them for the privilege of signing this contract. I think the contract speaks for itself.

Q. You paid them for the gasoline which was to be sold under that contract, isn't that correct?

A. That is correct.

Q. Referring to Exhibits 4-D and 5-E, were there any sums paid at the inception of these agreements or this agreement?

A. No, sir. It must be remembered at this time that gasoline was plentiful and sellers were looking for buyers.

Mr. Constable: That is all I have, your Honor.

Mr. Beek: If it please the Court, we have a few questions on redirect.

Redirect Examination

Q. (By Mr. Beek): Mr. Leh, in the conduct of these negotiations to which there has been testimony, who acted on behalf of The Progress Company? A. I did. [67]

Q. Did Mr. Brown act on behalf of The Prog-

(Testimony of Marc D. Leh.)

ress Company in these matters? A. No.

Q. Mr. Leh, can you tell us, in general terms, why you made the deal which consummated in Exhibit 8-H, the mutual termination agreement?

A. After the offer by the Olympic Refining Company to purchase our supply contract, or, as they referred to it, the termination agreement, it was my belief that this contract had reached its economic peak, and that the cash consideration, which I testified started out negotiations at \$600,000 and finally ended at \$215,000, was attractive to us, and for that reason we sold.

Q. Did you ever think about—or did you ever consider selling that supply contract to anyone else? A. Yes, I did.

Q. To whom? A. Eagle Oil Company.

Q. How far did negotiations progress in that direction?

A. Not past the preliminary stage, because Eagle Oil Company's cash position was too weak to entertain the proposal.

Q. What did you think was the market value of your supply contract in the market? [68]

A. \$215,000.

Q. You testified a few moments ago, Mr. Leh, that you picked up gasoline, or that your retailers picked up gasoline from Olympic Refining Company. Did Olympic Refining Company maintain a gasoline dump or terminal?

A. No. When I use the term "Olympic Refining Company," I was using it contractually as the

(Testimony of Marc D. Leh.)

title of the gasoline. We picked it up, I believe, at General Petroleum's refinery. I don't think the gasoline was transferred over to the Olympic Refining Company, and then we in turn picked it up there. I think it was General Petroleum's refinery where we physically obtained the gasoline.

Q. Now, Mr. Leh, I will ask you to look again at the mutual termination agreement, Exhibit 8-H, starting with the first "Whereas" clause on Page 1, that paragraph refers to an agreement. What agreement is that, Mr. Leh?

A. That agreement refers, in my opinion, to Exhibit 2-B.

Q. The next "Whereas" clause, Mr. Leh,—let's take the next two whereas clauses together—referring to certain letter agreements, which letter agreements are those, Mr. Leh?

A. That refers to 3-C, dated January the 14th, 1948, and refers to distributor's agreement 2-B, and then refers to another letter agreement canceling 3-C, and this cancellation [69] agreement is marked 6-F.

Q. That is the second "Whereas" clause to which you refer? A. Yes.

Q. Now, the third "Whereas" clause, Mr. Leh, refers to what?

A. That refers to 7-G, wherein the price clause of the distributor's agreement, 2-B, is amended, and refers to distributor's agreement 2-B. That is all.

Q. If you will look at the next "Whereas"

(Testimony of Marc D. Leh.)

clause, Mr. Leh, which is on the bottom of Page 1 and the top two lines on Page 2, will you read that clause to yourself, sir? A. Yes.

Q. Does that correctly state the fact?

A. Yes, it does.

Q. Will you tell us, sir, in your own language, what that clause says?

A. It says that the distributor's agreement known as 2-B, together with its amendments, were assigned to the Olympic Progress Oil Company by The Progress Company and/or David E. Brown and Marc D. Leh.

Q. Thank you. Will you please turn now to Page 3 of Exhibit 8-H, Paragraph 5 at the bottom thereof? Referring again to this matter of \$183,000 and the \$31,000 division, can you tell us, Mr. Leh, exactly—I don't ask you to [70] perform the calculation—but will you tell us exactly how those figures were arrived at?

A. Yes. You take ten per cent from 2,250,000, and I believe that leaves you 2,025,000 gallons. That is the monthly gallonage under the Progress agreement. To that you add 350,000 gallons, which is the amount under the distributor's agreement or 2-B. That gives you a total. That total, together with the individual amounts, represents \$183,000 and \$31,000 right to the penny.

Q. Mr. Leh, how did you arrive at the \$183,000 and \$31,000 from the total? You testified that you arrived at a total amount of gasoline.

(Testimony of Marc D. Leh.)

A. You have 1,375,000 gallons, if my mental calculation is correct.

Q. You mean two million?

A. 2,375,000 gallons. 2,025,000, as a percentage of that total in relation to \$215,000, gives you exactly \$183,330.50.

Q. Thank you, Mr. Leh.

The Court: In other words, you have a fraction in which the numerator is 2,025,000 and the denominator is 2,375,000?

The Witness: That is correct.

The Court: And that is multiplied by 215,000, and the result of that is the \$183,000 figure that you just spelled out? [71]

The Witness: That is correct.

Mr. Beek: Well said, your Honor.

Q. (By Mr. Beek): I am handing you now Exhibit S in evidence, and direct your attention to Paragraph 4 on the first page thereof.

A. Yes, sir.

Q. Will you explain what that paragraph means in relation to your previous testimony, and the background of that letter?

A. I testified this morning that we were not interested in getting out of the retail distribution of gasoline until negotiations had commenced by the Olympic Refining Company, and this Paragraph 4 is in support of that testimony. This letter is written under date of July 22, 1952, some two years after the sale that is described in 8-H.

(Testimony of Marc D. Leh.)

Mr. Beek: We have no further questions of this witness, your Honor.

Mr. Constable: Just one question, your Honor.

Recross Examination

Q. (By Mr. Constable): Referring to Exhibit 8-H, Mr. Leh, to the last paragraph on Page 1, to the assignment referred to therein, do you know the date that that assignment took place?

A. I can't answer that, Mr. Constable, other than sometime in the early part of 1948. [72]

Mr. Constable: That is all that I have, your Honor.

The Court: Exhibit 5-E, as I read it, The Progress Company is given the benefit of any extensions that Olympic Refining Company might make with General Petroleum?

The Witness: That's right.

The Court: At the same time, however, The Progress Company binds itself to make certain payments to Olympic Refining Company in the event that The Progress Company obtains some other source of supply for its gasoline? That is the second paragraph.

The Witness: That is correct, yes.

The Court: I presume that one of the items of consideration that entered into Exhibit 8-H, the termination agreement, was that your company was going to be relieved of the obligations of the second paragraph of Exhibit 5-E?

(Testimony of Marc D. Leh.)

The Witness: I would believe so. I don't know whether——

The Court: It was a package deal, I take it; that was one of the elements, so that if, at any later time, The Progress Company did wish to obtain sources of gasoline other than from Olympic Refining, it was free to do so?

The Witness: Yes, that is my understanding.

The Court: Whereas, it would not have been free to do so prior to that time unless it paid the penalty of a [73] half cent per gallon to Olympic?

The Witness: That's right. It is my opinion that we, in including this 8-H, included everything with the Olympic Refining Company, including 5-E.

Mr. Beek: We have no further questions, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Beek: We will call Mr. Butterworth.

Whereupon,

L. MARK BUTTERWORTH

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name and address.

The Witness: My name is L. Mark Butterworth. My home address—is that what you want?

The Clerk: Yes.

The Witness: 393 Flintridge Drive, Pasadena.

Direct Examination

Q. (By Mr. Beek): What is your occupation, Mr. Butterworth?

A. I am with General Petroleum in the marketing department. My particular capacity is that of manager of gasoline and fuels. [74]

Q. How long have you been engaged or employed in the marketing of gasoline and petroleum products?

A. Well, I have just been reminded that it is in excess of 30 years.

Q. In what capacity have you been employed by General Petroleum Corporation since 1948?

A. Since 1948, under a title of assistant general manager, marketing department, and then in my present capacity as manager of gasoline and fuels.

Q. In your capacity as manager of gasoline and fuels, are you familiar with the various supply contracts or commitments of General Petroleum Corporation in the Southern California area?

(Testimony of L. Mark Butterworth.)

A. By supply contracts——

Q. Using the term broadly.

A. I want to be sure I understand what you refer to by “supply contracts.”

Q. Well, you are familiar, or are you familiar with the marketing procedures of your company, generally, in the Southern California area?

A. Yes, and I would be familiar with marketing department supply contracts.

Q. I understand. Are you in your capacity familiar with the market conditions in petroleum products, generally? By that I refer to supply and demand and other market variables. [75]

A. Yes. I have to be, of course.

Q. Now, Mr. Butterworth, did your company, meaning General Petroleum Company, sell gasoline to the Olympic Refining Company during the period from 1945 until 1950? A. It did.

Q. Could you give us your description of the market conditions in the gasoline market as you saw them during that period of years up to and including the start of the Korean War?

A. Did you say 1945?

Q. From 1945 until 1950. In other words, between the end of World War II and the commencement of the Korean conflict.

A. Well, immediately, or at the conclusion of the second world war, we believed, as did the majority of others, I think, that there would be a very definite slackening of industry here on the west coast occasioned by the aircraft and ship building industries being suspended, as we thought

(Testimony of L. Mark Butterworth.)

at the time. The indication seemed to point to the fact that there would be a surplus of petroleum products, and as a consequence of that, General Petroleum entered into certain supply agreements in the year 1945 and 1946. We did not, however, guess correctly—neither did anyone else, apparently—and other than a slight slackening of business following the close of World War II, we found that our increase in population [76] came into being, industrial development began to occur, and starting in late 1947 or early 1948, we in General Petroleum began to feel the pinch of supply, and that condition, a shortage of supply, became progressively worse from 1948 into 1949, still worse in 1950, and worsened from then on.

Q. With reference now to the market commitments or supply contracts which General Petroleum had entered into during the period you described of 1945 and 1946, what action or attempted action did General Petroleum take to meet the short supply situation which you described in 1948, 1949 and 1950 and thereafter?

A. Well, it was perfectly obvious that our first obligation was to supply the people with whom we had contracts and those with whom we did not have contracts, as a matter of fact. I am including now our distributors, some of whom are contracted and some of whom are not, and then, of course, our direct operations through our salaried operations, which are the terminal points like Los Angeles, for example.

(Testimony of L. Mark Butterworth.)

During that period of time, then, in order that everyone of our customers might receive their fair share of the products that we had available, it was necessary for us to see that contract maximums were not exceeded. We did that to the best of our ability. In addition to that, we took occasion to attempt, at least, to limit quantities under supply contracts by negotiating with some of the people with [77] whom we had contracts, in an effort to reduce quantities. I might say in that regard, we were not very successful.

Q. Referring specifically now to the Olympic Refining Company, did you in 1950 negotiate with the Olympic Refining Company in this regard?

A. Yes.

Q. Who conducted the negotiations between your company and Olympic Refining Company?

A. For the marketing department, I was the liaison person representing, of course, my principals.

Q. You personally handled the negotiations?

A. Yes.

Q. What was the outcome of those negotiations, Mr. Butterworth?

A. The outcome of the negotiations that we had with Olympic Refining resulted in the payment to them of an excess of \$200,000 for the cancellation of our supply contract, as we call it, with Olympic Refining, and the negotiation also included the entering into a new contract with Olympic Refining.

(Testimony of L. Mark Butterworth.)

Q. Was that new contract substantially smaller in amount?

A. It was exactly half. Quantities were reduced 50 per cent.

Q. I show you now Exhibits 9-I and 10-J, and ask you [78] if you are familiar with them, Mr. Butterworth.

A. Yes, I am familiar with them—or with this ones, pardon me.

Yes, I am familiar with both of these.

Q. And you have just testified that a new deal was made with Olympic. Do those documents represent the consummation of your negotiations and the making of a new deal?

A. Yes, they do.

Q. Directing your attention, Mr. Butterworth, to the fifth and sixth lines—excuse me—the first and second lines of this document, Exhibit 9-I, the payment of certain sums of money referred to there, do you know how much that payment was?

A. Yes. It seems to me—this is very close to the exact amount—the amount of money paid was about \$237,000.

Q. And that is the amount that you testified to a moment ago as being in excess of \$200,000?

A. Yes.

Mr. Beek: Thank you. I have no further questions of this witness.

Mr. Constable: No questions.

The Court: You are excused.

(Witness excused.)

The Court: There will be a recess.

(Short recess taken.)

Mr. Beek: The petitioner will now call Mr. Jack M. Jessen. [79]

Whereupon,

JACK M. JESSEN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name and address?

The Witness: Jackson M. Jessen, 811 West Seventh Street.

Direct Examination

Q. (By Mr. Beek): What is your occupation, Mr. Jessen? A. Attorney at law.

Q. Were you in private practice in 1950?

A. No. I was in the legal department of General Petroleum Corporation.

Q. What was your official designation with General Petroleum Corporation?

A. At that time I was secretary of the corporation and also assistant counsel in the legal department.

Q. How long were you with General Petroleum Corporation? A. About 22 years.

Q. I would like to show you, Mr. Jessen, Exhibits 1-A, 9-I and 10-J, and ask you whether you are familiar with these documents. [80]

A. Yes, sir. I have seen copies of these before. These are photostatic copies.

(Testimony of Jack M. Jessen.)

Q. Did you write or dictate Exhibits 9-I and 10-J?

A. Apparently I dictated 10-J, because it has my initials on it and my secretary's initials at that time, showing it was dictated on July 24, 1950. 9-I was apparently dictated by Olive E. Boswell, a member of the law department at that time. It shows her initials and Miss Cooney's, her secretary's initials, on 9-I.

Q. I will show you now Exhibit 8-H and ask you if you are familiar with the document.

A. Yes. I saw this agreement in discussions with Mr. Paradise, who was representing Olympic Refining Company.

Q. You were familiar with 8-H at the time you dictated 9-I and 10-J?

A. Yes. That was taken into consideration in the preparation of both 9-I and 10-J.

Q. Now, if you will, Mr. Jessen, will you describe briefly the business background and the significance of the transaction which is represented by these documents?

A. Well, in 1950, when these various instruments were prepared, Mr. Butterworth of the marketing department advised that due to shortage of supply of General Petroleum Corporation, they were seeking other supplies, and in connection with that, they looked at their present existing contracts with buyers [81] with the view of trying to repurchase some of that supply in order to re-

(Testimony of Jack M. Jessen.)

lieve the shortage of supply the General Petroleum was faced with at that time.

Mr. Constable: I am going to object and move that that answer be stricken. Up to this point, I haven't objected to terminology that has been used. There is some question about whether these contracts, whether they are terminated or whether they are sold or whether there is a rescision. Now, Mr. Jessen referred to this contract, the cancellation of it or the termination of it in terms of 'a sale or purchase. Now, I am making the objection on the grounds that it is a conclusion, and that the termination of the agreement should be described as it factually occurred and not as a conclusion of law as to whether there was a purchase or sale of it.

The Court: I will not be bound or mislead by the terminology of the witness. I will interpret his testimony in the light of the evidence that is before the Court.

Mr. Beek: If the Court please, we are agreeable to striking any objectionable terminology, but we don't feel that the entire testimony should be stricken on that ground.

The Court: I won't strike any of it.

Q. (By Mr. Beek): Will you continue, Mr. Jessen, with the narrative which you were giving us?

A. Well, Mr. Butterworth came to my office and said [82] that he had—that he was negotiating with the Olympic Refining Company to purchase a certain amount of the supply called for under

(Testimony of Jack M. Jessen.)

their contract, and had arrived at a figure, as I recall, at that time, of around \$235,000 that they were going to pay for that repurchase and reduction in the quantity then committed under the prior agreement.

In connection with that, Mr. Paradise of Olympic Refining Company had various conferences with me, pointing out that they had to—in connection with the resale to General Petroleum, been relieved of their contractual commitment to The Progress Company, and pending a satisfactory deal with Progress Company, then they would be in a position to execute the documents with General Petroleum.

Q. Thank you. Now, do I understand your testimony to be that there was a payment of cash in connection with these documents, in connection with this transaction?

A. That is my understanding, that a cash payment in the sum of approximately \$235,000, or some sum in that field, was paid by General Petroleum to Olympic Refining Company at the time these various documents were executed.

Q. Did you know the purpose of that payment?

A. It was consideration for the repurchase of the gasoline, the quantity of gasoline which we were buying back from Olympic and being relieved of our contractual commitment to supply that amount. [83]

The Court: You don't mean that you were repurchasing the gasoline?

(Testimony of Jack M. Jessen.)

The Witness: Yes, sir.

The Court: You mean that you were being relieved of the obligation to supply gasoline in the future?

The Witness: We were being relieved of the quantity of our contractual obligation to supply that quantity, but we needed that quantity to supply to other customers.

The Court: I understand. So physically you weren't repurchasing gasoline?

The Witness: Well, my construction is that we were.

Q. (By Mr. Beek): Well, Mr. Jessen, the transaction didn't involve the purchase of a specific number of gallons of gasoline, did it, a present existing quantity?

A. No. It involved a repurchase of a commitment to deliver X quantities of gasoline over X period of time.

Q. I think we understand. Do you recall now, Mr. Jessen, how large a reduction in quantity was negotiated and concluded by these contracts?

A. My recollection is that it involved some 200 or 225,000 gallons of gasoline per month—oh, no—two million and a quarter gallons of gasoline per month.

Q. You were familiar in a general way with the [84] contract between the Olympic Refining Company and The Progress Company?

A. In general, yes.

(Testimony of Jack M. Jessen.)

Q. Did you know the quantity called for by that contract?

A. It was my understanding from conversations with Mr. Paradise that it involved some two million and a half to 2,750,000 gallons a month.

Q. Would such a contract have a market value?

A. In my opinion, yes.

Q. Would such a market value be substantial, or would such a contract—strike the first question.

Would such a contract be salable for cash?

A. It would all depend upon the circumstances existing at the time. Now, in 1950, when practically all suppliers on the Pacific Coast were short of supply, any supply contract of a substantial amount would have quite a market value, in my opinion, at that particular time.

Mr. Beek: I have no further questions of this witness, your Honor.

Mr. Constable: One question, your Honor.

Cross Examination

Q. (By Mr. Constable): Under this contract which General Petroleum had with Olympic Refining, was there, at the time of the [85] termination, any gasoline to be repurchased under the termination agreement?

A. I don't know quite what you mean by termination agreement.

Q. Well, you were contemplating an agreement whereby you would terminate your relations after Exhibit 1-A, is that correct?

(Testimony of Jack M. Jessen.)

A. No. We were not terminating all of our obligations under 1-A.

Q. You were terminating some of them?

A. We were partially terminating in order to be relieved of a commitment to supply the total quantity. We were reducing the commitment to a lesser quantity.

Q. That's correct. Now, you were not contemplating repurchasing any gasoline physically?

A. Well, the gasoline wasn't in existence, because we didn't have it. That's why we were trying to reduce our commitment.

Q. Had the gasoline been sold to Olympic Refining as yet?

A. We had a contractual agreement to supply them, so we had to get the gasoline to supply them under that contract.

Q. You had a contract to sell, not a contract of sale?

A. Definitely, and if we had not lived up to it, we would have been liable for breach of contract and damages. [86]

Q. You would have been liable for money damages, not for the gasoline?

A. Definitely.

Mr. Constable: That is all.

Mr. Beek: Nothing further.

(Witness excused.)

Mr. Beek: The petitioner will call Harold Steitz.

Whereupon,

HAROLD J. STEITZ

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name and address for the record, please.

The Witness: Harold J. Steitz, 626 East Menacino Street, Altadena.

Direct Examination

Q. (By Mr. Beek): What is your occupation, Mr. Steitz?

A. Vice president of the Olympic Refining Company.

Q. How long have you been associated with the Olympic Refining Company?

A. Since the latter part of 1946.

Q. In your capacity as vice president, what, if any connection do you have with the marketing functions of Olympic [87] Refining Company?

A. I am in charge of the marketing operations.

Q. Have you been in charge of marketing operations since you joined Olympic Refining Company?

A. Yes, I have.

Q. During the years subsequent to the time you joined Olympic Refining Company through the year 1950, from whom, if anyone, did Olympic Refining Company buy gasoline?

A. General Petroleum Corporation.

Q. I show you now Exhibits 4-D and 5-E, and ask you if you are familiar with those documents?

(Testimony of Harold J. Steitz.)

A. Yes, I am familiar with them.

Q. Your signature appears on both those documents, does it not? A. Yes, it does.

Q. Could you now tell us briefly the business background leading to the execution of those letters that you have before you?

A. Well, we had a supply contract from the General Petroleum Corporation which entitled us to take three and a half million gallons of gasoline per month, and I believe that we had been successful in marketing some million or million and a quarter, or some such figure as that. We were not taking the entire supply, and obviously, of course, we wished to sell it and gain the profit from it, and for that [88] reason we made this contract with The Progress Company, Mr. Leh and Mr. Brown.

Q. You used, then, The Progress Company as an outlet for your gasoline, did you not?

A. That is right.

Q. Mr. Steitz, did your company handle physically the gasoline that was sold to The Progress Company under those contracts?

A. No, we did not. The gasoline was taken at the refinery of General Petroleum, which was our supply point.

Q. Did you arrange for the pickup and delivery of that gasoline or not? A. No.

Q. I show you now Exhibit 8-H, which is captioned "Mutual Termination Agreement," and ask if you are familiar with that document.

A. Yes, I am familiar with this.

(Testimony of Harold J. Steitz.)

Q. Your signature is affixed thereto, is it not?

A. Yes, it is.

Q. What consideration was paid to The Progress Company and to the Olympic Progress Company under that contract, do you recall?

A. I believe it was \$215,000.

Q. Where did that money come from, Mr. Steitz?

A. From General Petroleum Corporation. [89]

Q. Subsequent to the execution of that mutual termination agreement, was there any change in your contract with General Petroleum Corporation?

A. Yes, it was reduced, the quantity was reduced.

Q. I would like you to look at Exhibits 9-I and 10-J, Mr. Steitz, and ask you if you are familiar with those documents?

A. I am familiar with 9-I. Yes, I am familiar with 10-J, also.

Q. Thank you. Do those documents, 9-I and 10-J, reflect the new arrangement between your company and General Petroleum?

A. Yes, they do.

Mr. Beek: I have no further questions of this witness, your Honor.

Mr. Constable: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Beek: May we have a moment, your Honor, to converse?

The Court: You may.

Mr. Beek: The petitioner will rest, if your Honor please.

The Court: Before I ask the government if it wishes to put on any rebuttal testimony, I am going to ask Mr. Brown if he has any evidence that he wishes to present. [90]

Mr. Brown: Well, I don't know who is going to ask me the questions, of course——

The Court: If you have any testimony of your own, you may take the witness stand and be sworn in, and I will permit you to give your testimony to the Court in narrative form.

Whereupon,

DAVID E. BROWN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Court: I will allow both counsel for the government and counsel for the Petitioners in this case to interrogate you at the conclusion of your testimony, if they so desire.

The Witness: In other words, I am just to say what I believe, is that it, or is someone going to question me?

The Court: You may give such testimony as you feel should be before the Court, taking into account everything that has been placed before the Court already, which is in evidence and applicable to your case as well as to the other docket number.

(Testimony of David E. Brown.)

The Witness: Well, I'd say this: That reviewing—or hearing the testimony of all that was on the stand, I was brought into this picture by Mr. Leh and with Mr. Steitz, vice president of the Olympic Refining Company, and had very little [91] to do with the original negotiations on the purchase of gasoline from Olympic Refining Company, during the time when gasoline was hard to get either by General Petroleum or Olympic Refining Company—we had lots of trouble in getting any gasoline from Olympic Refining Company. Why, I don't know. I heard today that it was due to a shortage. I don't know.

I left, I would say, the Progress Company office, or the Los Angeles office, to go over the farm interests that Mr. Leh and I had in Coachella Valley, and prior to my leaving for the ranches, there was some discussion in my presence with Harold Steitz and Mr. Leh, and it was to the effect to sell our contract. I might have been in two or three of those conversations.

About five or six months, as I say, after I left for the ranches, Mr. Leh called me at Coachella Valley and told me he had negotiated a deal with Harold Steitz, and the price was \$275,000. He called me back, I would say, in about one hour, and he said, "They won't pay \$275,000."

He asked me what the least that I would be willing to take was, and I believe they reduced the price, Olympic Refining Company, under \$200,000, and my answer to Mr. Leh was \$215,000. Mr. Leh

(Testimony of David E. Brown.)

phoned me in about an hour or two hours that evening, and said that they had accepted; the papers were drawn, Mr. Leh sent for me to come back, and we went over to Mr. Paradise's office with Mr. Steitz—I think Mr. Paradise [92] was alone in his office—it was Mr. Steitz, Mr. Leh and myself, and the papers were all finished ready for our signatures.

Now, another thing I would like to clear is the Olympic Progress Oil Company's contract. It was my understanding that they did have 300 to 350,000 gallons. Mr. Leh or myself had nothing to do with the running of the Olympic Progress Oil Company. It is true—it is a fact that we owned together 76 per cent of the stock, but the business was run by Mr. Lee Orr and Boyd Rogers.

Mr. Leh had told me that he had discussed the sale of the contract with Mr. Orr and Mr. Boyd Rogers, and when I returned from the ranch, I asked Mr. Orr and Rogers if they were satisfied with \$215,000. They knew also what we were getting.

I just wanted to say that, your Honor, because I think there was confusion about the Olympic Progress, whether we actually dictated the policies.

I don't think I have anything else.

The Court: Does that complete your testimony?

The Witness: Yes.

The Court: Mr. Constable, do you have any questions you would like to put to the witness?

(Testimony of David E. Brown.)

Mr. Constable: Yes. I have a couple of questions. [93]

Cross Examination

Q. (By Mr. Constable): Mr. Brown, you referred to some trouble in getting gasoline from Olympic Refining Company during your testimony. Do you recall that testimony? A. Yes.

Q. Do you know what that trouble was?

A. No. All I know is that the Olympic—Mr. Steitz had said many times that he was having trouble with General Petroleum.

Q. Was the trouble in the form of any claims on The Progress Company by the Olympic Company?

A. I don't think so. I think the trouble was because we were cutting the prices.

Q. What did they purport to do about that?

A. Couldn't get the gasoline.

Q. Who couldn't get the gasoline?

A. Olympic Refining Company.

Q. I don't understand your statement. You say Olympic Refining Company could not get the gasoline?

A. That's what they said, that they were cut down. The records will show that we weren't taking as much gasoline as previous. There was a shortage of gasoline.

Q. Weren't you entitled to take a certain amount under your contract? [94] A. Yes.

Q. And you were given less than that amount?

A. At times.

(Testimony of David E. Brown.)

Q. Didn't The Progress Company ask Olympic Refining Company for their maximums under the contract? A. Yes, sir.

Q. What did Olympic Refining say?

A. They go to General Petroleum, they couldn't do anything about it.

Q. Certainly The Progress Company had some sort of claim against the Olympic Refining Company?

A. That's the claims I believe were referred to by Mr. Leh, that you asked him about.

Q. Were those claims covered in the termination agreement that you——

A. I believe that Mr. Paradise included those claims, because Mr. Leh discussed the claims, said we were going to do something about it to Steitz, and Steitz in all probability told it to Paradise; when he drew up this so-called termination allowance or termination contract, he included any claims that Progress or that Olympic Progress Company would have. That is my understanding of it.

The Court: Now, do I correctly understand your testimony that The Progress Company had not been getting the full amount of gasoline that it was entitled to pursuant to its [95] contract with Olympic Refining Company, for one reason or another?

The Witness: That's right.

The Court: And that it therefore had some claim against Olympic Refining Company for its failure to receive the full contractual amount?

The Witness: That's right.

(Testimony of David E. Brown.)

Q. (By Mr. Constable): Mr. Brown, you mentioned that Mr. Leh had called you at a ranch somewhere concerning the offer made by Olympic Refining Company to terminate the contracts in question. You mentioned that—you said \$215,000. Do you recall that testimony now?

A. Yes. He told me two hundred seventy-five, and he came back and said he couldn't get it.

Q. And then you told Mr. Leh on the telephone that the bottom figure would be \$215,000, is that correct?

A. After he told me they wouldn't—I think the price was around one hundred seventy-five or \$190,000, and the least that I said that I would take would be \$215,000.

Q. When you said \$215,000, did you mean both on behalf of Progress Company and Olympic Progress Company? A. Yes.

Q. In other words, you regarded both the companies and contracts together in the \$215,000?

A. I believe that's right, yes.

Q. Mr. Brown, how did you arrive at your minimum, at the figure \$215,000? Was that an amount that was owing by you to Olympic Refining Company?

A. I wouldn't know that, sir.

Mr. Constable: Will you mark this?

The Clerk: Exhibit T for identification.

(The document above referred to was marked

Respondent's Exhibit T for identification.)

Q. (By Mr. Constable): Mr. Brown, I show

(Testimony of David E. Brown.)

you what is marked Exhibit T for identification, and ask you if your signature appears on Page 2?

A. Yes, that is my signature.

Q. Will you read to yourself, refresh yourself on the second paragraph on Page 2?

A. Yes, that's right.

Q. Does this letter, Mr. Brown, purport to explain how the figure \$215,000 was arrived at?

A. Not necessarily. You asked me what was the amount owed. I didn't know it when I was at the ranch. You are referring to a letter here to me—I mean that I wrote to the Regional Commissioner, Mr. Sears, here last month, and that letter refers to The Progress Company.

Q. In this letter, which is marked Exhibit T, you state, "We had no alternative but to sell the contract for [97] the unpaid balance that Olympic claimed we owed them."

What did you mean by that statement, Mr. Brown?

A. Well, right before that, you neglected to read that it was my understanding that General Petroleum did not—they didn't—you read the first part of that. I just don't recall——

(Exhibit handed to witness.)

The Witness: Yes. I say the Olympic Refining Company did not, in my opinion—in this case, as I understand it, the Olympic Refining Company did not sell their contract, nor did they terminate their contract with General Petroleum Corporation. They

(Testimony of David E. Brown.)

did, however, get an extension of the contract with General Petroleum Corporation.

Yes. "We had no alternative but to sell the contract for the unpaid balance that Olympic claimed we owed them."

Now, in other words, no check or moneys were paid to The Progress Company or to any other companies that Leh or Brown were interested in, nor to us, as individuals.

Mr. Constable: I will offer Exhibit T into evidence, your Honor.

The Court: Admitted.

(The document heretofore marked Respondent's Exhibit T was received in evidence.)

Mr. Constable: That's all I have.

Mr. Beek: May we ask a question or two of Mr. Brown, your Honor? [98]

The Court: You may.

Q. (By Mr. Beek): Mr. Brown, you testified that during the time prior to the execution in Mr. Paradise's office of Exhibit 8-H, you were out of town. Where were you at that time, Mr. Brown?

A. I was harvesting the crop in Dr. Forbes' ranches.

Q. Where are those located?

A. South of Indio about 17 miles.

Q. Did you have a place of residence at Dr. Forbes' ranches, Mr. Brown? A. Yes, sir.

Q. Do you recall now for how many months you stayed on the ranch?

A. Sometimes I'd go down there for 30 days and

(Testimony of David E. Brown.)

come back for four or five days, and then back again.

Q. Did you take part in any negotiations with the Olympic Refining Company or with Mr. Steitz relative to this matter under discussion?

A. I would say no.

Q. You left that to your partner, Mr. Leh?

A. Well, Mr. Leh and I discussed it, but, as I remember it, the final negotiations were between Mr. Leh and Steitz.

Q. Then if I understand you correctly, although [99] you and Mr. Leh discussed these matters between you, Mr. Leh conducted negotiations with Mr. Steitz and other third parties, is that correct?

A. I would say that is true.

Q. When those negotiations began, Mr. Brown, do you know whether or not The Progress Company was behind in making its payments to the Olympic Refining Company?

A. What is that again? Were they behind in the payments? What date are you speaking of?

Q. At whatever time negotiations for the sale or termination of this contract began.

A. Well, I wouldn't say so, because if we were taking two million times twenty cents—I believe the contract states the terms of payment—I think it was 30 days or the 10th of the following month, so if you took two million times twenty cents, it would be \$400,000, and as I see here, here is \$183,000, so in view of that, I wouldn't think that we were behind.

(Testimony of David E. Brown.)

Q. Thank you, Mr. Brown. Mr. Brown, I would like to call your attention to Exhibit 4-D in evidence, and to the first paragraph thereof numbered 1. Do you recall whether or not the shortage that you referred to was the ten per cent more or less which is referred to in this paragraph 1?

A. I wouldn't know that.

Q. You have testified a few moments ago that [100] sometimes you didn't get—that the Progress Company didn't get the full two and a quarter million gallons in a month, is that correct?

A. That's right.

Q. Would the shortage be ten per cent, as indicated in Paragraph 1, or do you know?

A. I wouldn't know that.

Mr. Beek: I don't think we have any further questions, your Honor.

Mr. Constable: May I have just one moment, your Honor?

Q. (By Mr. Constable): Mr. Brown, how did The Progress Company account for whatever liability it may have had to the Olympic Refining Company for gasoline supplied to The Progress Company?

A. I don't believe I understand your question. How did it account—

Q. Are you familiar with the books of The Progress Company? A. Not too familiar.

Q. Do you understand the liability sections of the general ledger account?

A. I would say I know something about it.

(Testimony of David E. Brown.)

Q. Did The Progress Company keep a running balance of the amount which it owed to the Olympic Refining Company under gasoline contracts?

A. I wouldn't know that. I didn't keep the books.

Mr. Constable: That's all I have.

The Court: Do you have any further testimony to give, Mr. Brown?

The Witness: No.

The Court: You may step down.

(Witness excused.)

The Court: I will now ask you whether you have any other testimony to present, apart from your own testimony?

Mr. Brown: No, I do not, your Honor.

The Court: Let me ask further whether the government has any evidence to present.

Mr. Constable: Nothing, your Honor.

The Court: Does the Petitioner have any rebuttal?

Mr. Beek: Your Honor, may we call Mr. Leh for one brief question, please?

Whereupon,

MARC D. LEH

recalled as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Mr. Beek: Is the witness still sworn, your Honor?

The Court: The witness has already been sworn.

(Testimony of Marc D. Leh.)

Q. (By Mr. Beek): Mr. Leh, you have heard the testimony of Mr. Brown concerning shortages of supply?

A. Yes.

Q. Could you explain to us, or do you know what shortages of supply he refers?

A. It is my recollection that on or about April, May, June and July of 1950, the United States government was in a serious shortage on the Pacific Coast due to the Korean War threat, or if it had started—I am not quite sure of my dates—but the industry held a meeting at the Biltmore Hotel headed by Mr. Arthur Stewart, as chairman, for each one to give as much gasoline and petroleum products as they could, and under that agreement, or under that meeting, it may have been that we did not take the physical number of gallons of gasoline specified under the contract as a contribution toward the war effort. Now, I'd have to go back and refresh my memory as to actual dates and times, but in substance, that is the shortage that was on in the industry, and we participated in that.

Q. Do you recall whether this shortage with this situation entered into the negotiations leading up to the mutual termination agreement in any way?

A. No. The shortage may have created the economic value, but the shortage as shortage, no.

The Court: Apart from your acquiescence, did [103] Olympic furnish you with less gasoline than you were entitled to under your contract, and were you demanding that they live up to their contract?

The Witness: No.

(Testimony of Marc D. Leh.)

The Court: Were you getting less than the contract provided for?

The Witness: I believe there were several months where, in the situation as an industry, we were getting less than the contract provided for.

The Court: Then you did have a claim against them for the difference?

The Witness: No, not in my opinion, your Honor, for the reason that we made the contribution in the industry and not to Olympic.

Q. (By Mr. Beek): Mr. Leh, did that reduction come within the ten per cent provisions of your contract with Olympic?

A. It is my understanding it did.

The Court: If it came within the ten per cent, then there weren't any shortages under the agreement?

The Witness: Your Honor, I can't testify whether there were shortages under the agreement or not, but in the situation that existed in 1950, I do know that the industry, in connection with the government, asked for a participation of all people to make voluntary contributions of petroleum [104] products, and it took place on or about that time.

Q. (By Mr. Beek): Mr. Leh, did you ever at any time assert that you had a legal claim or a claim having a dollar value arising out of such shortages?

A. To Olympic Refining Company?

Q. To anyone. A. No.

(Testimony of Marc D. Leh.)

Q. One further question. Is any part of the consideration of \$215,000 in the mutual termination agreement attributable to this shortage which we have been discussing? A. No. [105]

* * * * *

[Endorsed]: T.C.U.S. Filed April 30, 1956.

[Title of Tax Court and Causes.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 59, inclusive, constitute and are all of the original papers, as called for by the "Designations of Contents of Record on Appeal", including Joint exhibits 1-A through 12-L, attached to the Stipulations of Facts, Joint exhibits 13-M and 14-N, attached to the Stipulation of Facts in Docket No. 53879, Joint exhibit 15-O in Docket No. 53878, Petitioners' exhibit 16, admitted in evidence, and Respondent's exhibits P through T, admitted in evidence, in the cases before the Tax Court of the United States docketed at the above numbers and in which the petitioners in the Tax Court have filed petitions for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court cases as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia, this 5th day of November, 1957.

[Seal] HOWARD P. LOCKE,
Clerk, Tax Court of the United
States.

[Endorsed]: No. 15797. United States Court of Appeals for the Ninth Circuit. Marc D. Leh and L. Waive Leh, Petitioners, vs. Commissioner of Internal Revenue, Respondent. David E. Brown and Christobel H. Brown, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petitions to Review Decisions of the Tax Court of the United States.

Filed: November 19, 1957.

Docketed: November 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15797

MARC D. LEH and L. WAIVE LEH,
Appellants,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

DAVID E. BROWN and CHRISTOBEL H.
BROWN,
Appellants,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

STATEMENT OF POINTS

To: Paul P. O'Brien, Clerk of the United States
Court of Appeals:

Please Take Notice that pursuant to Rule 17 (6)
of the Rules of Practice of the United States Court
of Appeals for the Ninth Circuit, Appellants in the
above-entitled matter herewith present the points
upon which they claim the Court erred:

Point I

In failing to find that, as a matter of fact, a cer-
tain amount, namely, \$183,330.50, received by the
taxpayers' partnership during 1950, constituted pro-
ceeds of the "sale or exchange" of property.

Point II

In failing to find that, as a matter of law, said sum was taxable as long term capital gain under Section 117 of the Internal Revenue Code of 1939, and not as ordinary income.

Dated this 26th day of November, 1957, at Los Angeles, California.

/s/ JAMES L. WOOD,
Attorney for Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 27, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto through their respective counsel of record that the exhibits herein be considered by the Court in their original form without the necessity of their reproduction in the printed record.

Dated: December 9, 1957.

/s/ JAMES L. WOOD,
Attorney for Petitioners.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.

[Endorsed]: Filed Dec. 10, 1957. Paul P. O'Brien, Clerk.